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Supreme Court, U.S.
FILED

99 826 NOV 11 1999

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No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA,
*Petitioner*

*v.*

DAVID CHMIEL,
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the prosecution's use of the testimony of a former lawyer to impeach a criminal defendant's contradictory testimony at his new trial violate the Sixth Amendment right to counsel where the attorney-client privilege has previously been waived by the defendant's prior attack on former trial counsel's competence?

2. Does the prosecution's use of the testimony of a former lawyer to impeach a criminal defendant's contradictory testimony at his new trial violate the Fifth Amendment right to be free from compelled self-incrimination where the attorney-client privilege has previously been waived by the defendant's prior attack on former trial counsel's competence?

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## OPINIONS BELOW

The Supreme Court of Pennsylvania has granted a third trial to respondent in this capital murder case, and has issued two opinions in this case. The opinion of the Supreme Court of Pennsylvania, which the petitioner is asking the Court to review, is reported at 738 A.2d 406 (Pa. 1999) and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The trial court's opinion in this matter is not officially reported and is reprinted in the appendix at Pet. App. 50a. An earlier opinion of the Supreme Court of Pennsylvania in this matter is reported at 536 Pa. 244, 639 A.2d 9 (1994) and is reprinted in the appendix at Pet. App. 73a.

## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on August 19, 1999, and this petition has been filed within ninety days of that date. The Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const., Amend. VI.

2. The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person... shall be compelled in any criminal case to be a witness against himself..." U.S. Const., Amend. V.

3. The Fourteenth Amendment to the Constitution of the United States provides in relevant part that "[n]o State shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const., Amend. XIV, Section 1.

## STATEMENT OF THE CASE

After a second jury trial in 1995, the respondent, David Chmiel, (hereafter referred to as "Chmiel") again received three death sentences, formally imposed by the Court of Common Pleas of Lackawanna County, Pennsylvania, following jury verdicts finding Chmiel guilty of three counts of murder in the first degree arising from the stabbing deaths of three members of the Lunario family. Chmiel was also found guilty of two counts of robbery and one count of burglary. The aggregate sentences imposed for the robbery and burglary offenses amounted to fourteen to thirty two (14-32) years and were imposed consecutively to each other and to the death sentences. Chmiel was previously tried in 1984 for these crimes, found guilty of the same offenses and sentenced to three death sentences at that time. However, on direct appeal of the 1984 convictions, the Supreme Court of Pennsylvania determined that Chmiel's first trial counsel, Thomas Kennedy, Esquire, was ineffective by failing to request that an accomplice instruction be given by the Court to the jury with respect to its evaluation of the testimony of Commonwealth witness, Martin Chmiel, Chmiel's brother. Consequently, the Supreme Court of Pennsylvania ordered a new trial. *See Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9 (1994). In 1995, Chmiel was tried, convicted, and sentenced to multiple death sentences by a jury for the second time.

On February 9, 1995, just prior to Chmiel's second trial, a hearing was held on Chmiel's motion *in limine* to preclude the

petitioner's use of incriminating statements made by Chmiel to his counsel, Thomas Kennedy, Esquire, who represented Chmiel at his first trial. Pet. App. 3a, n.1. The trial court denied the motion finding that the incriminating disclosures Chmiel made to Attorney Kennedy would be admissible to impeach Chmiel if he took the witness stand in his own defense. Pet. App. 3a, 58a.

On appeal from his second conviction, Chmiel argued that the trial court's ruling allowing "the use of Attorney Kennedy's testimony at his second trial" to impeach Chmiel on cross examination, if he testified in his own defense, "violated his Fifth Amendment right to be protected against compelled self-incrimination" and "his constitutional right to the assistance of counsel" under the Sixth Amendment. Pet. App. 34a, 36a.

The factual circumstances that generated the issue surrounding Attorney Kennedy's testimony stemmed from his representation of Chmiel at his first trial. At that first trial, Chmiel was convicted of three counts of first degree murder in connection with the fatal stabbing of the Lunario family and was sentenced to three death penalties by the jury as well. During the post verdict motion stage of the proceedings in the state trial court, Chmiel acquired new counsel. In an effort to overturn his convictions at the trial level he alleged, through post verdict counsel, that Attorney Kennedy incompetently represented him at his first trial. One claim by Chmiel was that Attorney Kennedy did not adequately get witnesses to support his alibi and also did not permit him to testify as to his whereabouts on the night of the murders.[1] An evidentiary hearing was held

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[1]Another unrelated claim of ineffective representation, the failure of Attorney Kennedy to request an accomplice/

before the trial court in January of 1988 wherein Attorney Kennedy's competence as a lawyer was attacked by Chmiel in the hope of obtaining a new trial. Attorney Kennedy's proffered reasons for not calling Chmiel to the stand to establish an alibi were objected to by Chmiel on the basis of the attorney-client privilege.

At the evidentiary hearing on the ineffective assistance claims, the trial judge determined that the privilege had been waived based upon Chmiel's claim of lawyer incompetence and ordered Kennedy to testify as to why his client's statements to him caused him to pursue the actions he took in representing Chmiel at his first trial. Pet. App. 52a, 54a. "*The lawyer must comply with the final orders of a Court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.*" Rule of Professional Conduct 1.6, Pa. R.P.C. 1.6 Confidentiality of Information, Comment Disclosures Otherwise Required or Authorized, Pa. R.P.C. 1.6 (emphasis added). Kennedy then testified that it was the nature of Chmiel's client communications to him that informed his decision not to put Chmiel on the witness stand at his first trial in order to avoid suborning perjury. The nature of Chmiel's communications were that, in the course of seeking whether Chmiel had a valid alibi to which he could testify, Attorney Kennedy asked him where he was at the time of the crime. Chmiel told Kennedy three different and necessarily contradictory or inconsistent versions of his whereabouts. The first version was that Chmiel

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polluted source instruction with respect to the testimony of a Commonwealth witness, Martin Chmiel, met with favor in the Supreme Court of Pennsylvania and resulted in Chmiel being awarded his second trial. *See Commonwealth v.Chmiel*, 639 A.2d 9 (Pa. 1994); Pet. App. 73a.

admitted he was near the Lunario residence casing it out for a robbery at a future date when suddenly he saw his brother, Martin Chmiel, race from the shadows of the Lunario household, run down the alley way of the Lunarios' residence, get into a brown Toyota owned by Tom Buffton and drive off. Chmiel finished a cigarette he was smoking and then left the area. This version was given to Kennedy by Chmiel shortly after he retained Kennedy on October 5, 1983. Five months later, Chmiel told Attorney Kennedy he was not at the scene at all but in the company of Patrick Battle and others throughout the night; this was the version that he testified to at his second trial in 1995. The third version Chmiel gave Attorney Kennedy occurred after his brother Martin testified against him at his preliminary hearing. At that point, Chmiel told Attorney Kennedy that Martin Chmiel confessed to Chmiel that Martin Chmiel, Thomas Buffton and "some girl named Judy" killed the Lunarios. Pet. App. 12a.

Attorney Kennedy's reasons for persuasively recommending that Chmiel not take the stand at the first trial and testify to an alibi were simple. Chmiel had told him three different somewhat inconsistent and contradictory stories of where he was the night of the murders. In one of those contradictory versions, he places himself in close proximity to the scene of the crime at or close to the time Angelina Lunario screamed out in terror. Attorney Kennedy expressed his concern as follows:

> "I had the problem as a lawyer being told by my client what had happened here, and I had the problem of supporting perjury if I knew that he was going to take the stand and testify as to something that was not true."

Pet. App. 15a. The ethical dilemma faced by Attorney Kennedy as he asked for Chmiel's account to him of his alibi for the time of the murders was succinctly expressed by him in his previously reported testimony as follows:

> "Now, tell me where you were at that period of time ..." This is Mr. Kennedy testifying. "We started at, I think I asked him to start at 8:00 o'clock in the morning and minute by minute he told me where he was... the whole day until [h]e ends up in front of the Lunario house at or around the time the murders were being committed. I said. 'Oh, my God, how do we handle this?' That was changed a couple months later. He suddenly remembered he was elsewhere, and I've got to play the game, you know, I've got to get out there and structure an alibi with a witness who keeps changing. It's kind of a tough assignment."

Pet. App. 9a-10a. In this case, Attorney Kennedy obviously knew Chmiel was lying to him about where he was at the time of the crime, because he gave three distinct and contradictory versions of his whereabouts on a material issue. Refusing to undermine the truth determining process and present perjured testimony to the Court, Attorney Kennedy took the ethical high road and refused to present the defense of an obviously perjured alibi.

At Chmiel's second trial, Chmiel took the witness stand "and testified that he had not been in the vicinity of the crime scene when the murders were committed. The [prosecution] then sought to impeach [Chmiel] with [Attorney Kennedy's]

testimony from the ineffectiveness hearing where counsel testified that [Chmiel] told him that he had been present at the crime scene."[2] Pet. App. 46a.

The Supreme Court of Pennsylvania concluded that, although this evidence was properly admitted, based upon Pennsylvania's substantive law of evidence (Pet. App. 16a-31 a), its use, nevertheless, violated the Constitution because it deprived Chmiel of his Sixth Amendment right to the assistance of counsel for his defense and his Fifth Amendment right to be free from compelled self-incrimination. In this regard, the Supreme Court of Pennsylvania majority in a 5 - 2 decision stated that,

> we hold that the policy inherent in the legislative recognition and judicial enforcement of the attorney-client privilege, as it implicates a defendant's exercise of the right to the effective assistance of counsel and to freedom from compelled self-incrimination, restricts the use as well as the scope of permitted disclosures. Just as an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations, so the client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges. The trial court's decision to the contrary

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[2]The transcript of Attorney Kennedy's 1988 testimony at the ineffectiveness hearing was used because Attorney Kennedy died during the intervening period between the two trials. Pet. App. 39a, n. 11.

in the present case was error.

Pet. App. 40a-41a.

The dissenting opinion disputed the majority's conclusion that the use of this testimony violated Chmiel's Sixth Amendment right stating

> [n]otwithstanding the disclosure of these communications in open court that included appellant's initial statement that he had been at the crime scene on the night of the murders, appellant took the stand at his second trial and testified that he had not been in the vicinity of the crime scene when the murders were committed. The Commonwealth then sought to impeach appellant with trial counsel's testimony from the ineffectiveness hearing where counsel testified that appellant told him that he had been present at the crime scene.
>
> The trial court allowed such cross-examination. The majority now finds that the trial court erred in so doing because such practice would have a "chilling effect" on a party's assertion of his Sixth Amendment right to effective counsel. Thus, the issue becomes whether otherwise public, relevant information which would bear directly upon appellant's credibility should be excluded from a subsequent trial because the information was made public in order for appellant to raise an ineffective assistance claim. I would allow such communications to be used

against the defendant at a later proceeding.

. . .

> It is beyond peradventure that the attorney-client privilege is waived when a criminal defendant brings a claim of ineffective assistance of counsel. Essentially, the Court's decision today resuscitates the already-waived attorney-client privilege under the guise of protecting the defendant's Sixth Amendment right to effective assistance of counsel and concomitant right to seek a new trial. What the Court is really protecting, however, is not the right of a criminal defendant simply to seek a new trial, but rather the right to seek a new trial in which he is free to commit perjury without consequences. The attorney-client privilege should not provide a cloak of immunity for such a nefarious purpose. Once the privilege is waived for purposes of an ineffectiveness claim, it should remain waived for purposes of cross-examination in a second trial, rather than act as a shield which prevents the fact finder from being exposed to the defendant's naked perjury.

Pet. App.48a-49a.

Based upon its legal conclusions that Chmiel's rights under the Fifth and Sixth Amendments to the Constitution of the United States had been violated due to these events, the Pennsylvania Supreme Court majority reversed Chmiel's convictions and the judgments of sentence and remanded this case for a new trial. Pet. App. 1a, 41a. In granting a new trial,

the Supreme Court of Pennsylvania ruled that "Attorney Kennedy's testimony shall not be utilized for any purpose at retrial." Pet. App. 41a.

## REASONS FOR GRANTING THE WRIT

In rendering its decision in this case, the Supreme Court of Pennsylvania has erroneously expanded the scope of the Sixth Amendment and the Fifth Amendment in such a way as to place a premium on perjury to the detriment of the truth determining function that should be the overriding concern of the criminal justice system. The decision is a philosophical result-oriented approach to important questions of federal constitutional law that conflicts with analogous relevant decisions of this Court, decisions of other state courts of last resort and the United States Courts of Appeals. To the extent that the Supreme Court of Pennsylvania's characterization is accurate that "[t]his is a question of first impression not only in [Pennsylvania], but, apparently, in almost all other jurisdictions as well" (Pet. App. 20a.), then the Supreme Court of Pennsylvania "has decided an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup.Ct. Rule 10(c), 28 U.S.C.A.

### I. THE USE OF HIS FORMER LAWYER'S TESTIMONY FOR IMPEACHMENT DOES NOT DEPRIVE A CRIMINAL DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE .

The Supreme Court of Pennsylvania, with this decision, has fashioned an exclusionary rule, even though the attorney-client privilege was found by that very court to be non-existent

based upon a waiver of the privilege. The waiver occurred when Chmiel claimed that his prior counsel was ineffective for failing to put him on the witness stand to present a perjured defense. Although the question was not specifically reached, prior counsel was not found to be ineffective in this regard. *See Commonwealth v. Chmiel*, *supra*, at 12; Pet. App. 77a, 82a. An examination of the *Chmiel* decision for which review is sought makes it perfectly clear that the use of Attorney Kennedy's testimony was not barred by Pennsylvania's substantive law of evidence or obtained in derogation of the United States or Pennsylvania constitutions. No unlawful police conduct is implicated in this case that would warrant the harsh penalty of the exclusionary rule. *Cf. Michigan v. Tucker,* 417 U.S. 433, 446 (1974) (purpose of the exclusionary rule is to deter unlawful police conduct). Since the evidence was not tainted, how does it become excluded pursuant to the Sixth Amendment? It does not. To reach its decision that this evidence was barred by the Sixth Amendment, the Supreme Court of Pennsylvania ignored this Court's decision in *Michigan v. Harvey*, 494 U.S. 344 (1990).

In *Harvey*, this Court held that a defendant's statements obtained in violation of the defendant's invalid waiver of his initial assertion of the right to counsel due to subsequent police-initiated questioning could, nevertheless, be used "to impeach a defendant's false or inconsistent testimony" at trial. *Id.* at 345-46. *Harvey* was a case in which the acquisition of the incriminating statements indisputably occurred as a direct result of Harvey's request to consult with counsel being sidestepped by the police. Yet, the prosecution was still permitted to impeach Harvey because of the salutary concern of the Court that failure to allow the impeaching evidence would undermine the truth determining function of the justice system in this nation:

If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately ... and we have consistently rejected arguments that would allow a defendant to turn the illegal method by which evidence in the government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

• • •

There is no reason for a different result ... where the prophylactic rule is designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel rather than the Fifth Amendment privilege against self-incrimination or right to counsel.

• • •

In such cases, we have decided that the search for truth in a criminal case outweighs the speculative possibility that exclusion of evidence might deter future violations of rules not compelled directly by the Constitution in the first place.

• • •

... Both *Jackson* and *Edwards* establish prophylactic rules that render some otherwise valid waivers of constitutional

> rights invalid when they result from police-initiated interrogation, and in neither case should the shield provided by [the prophylactic rule] be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

*Id.* at 351-53 (internal quotations and citations omitted). It is important to emphasize that the Supreme Court of Pennsylvania concluded that Chmiel's statements were legally obtained, unlike the situation in *Harvey*, because the attorney-client privilege had been waived and this testimony was properly admissible, even in the prosecution's case-in-chief, as substantive evidence for the reason that separate exceptions to the state's rule against hearsay were independently satisfied. *Chmiel*, Pet. App. 16a-31a. Yet, the Pennsylvania court of last resort erroneously concluded that the Sixth Amendment requires that this evidence must be excluded for the reason that the statements were made known by Chmiel's former lawyer at an evidentiary hearing necessitated by Chmiel's claims of prior counsel's ineffectiveness where Chmiel was represented by new counsel. In no way can it be concluded that Chmiel has been denied the right to the assistance of counsel for his defense. He has been represented by multiple lawyers over the past sixteen years.

Although the prosecution could have presented these statements Chmiel made to Attorney Kennedy in its case-in-chief because the evidence was untainted, Chmiel was instead placed on notice that the prosecution could bring up these statements only if Chmiel elected to testify in a contradictory manner about material matters. Despite this admonition, Chmiel

took the witness stand and proceeded to commit perjury. The Pennsylvania Supreme Court, contrary to various holdings by this Court expressing, even in the face of constitutional violations, concern over our inferior courts permitting deliberate intentional falsehoods by a defendant without the countervailing effect of pertinent impeachment through cross-examination, erroneously concluded that the Sixth Amendment improperly prevented the jury from being exposed to the paramount concern for the "search for truth in a criminal case." *Oregon v. Hass*, 420 U.S. 714, 722 (1975); *see also Harris v. New York*, 401 U.S. 222, 225 (1971); *Walder v. United States*, 347 U.S. 62, 65 (1954); *United States v. Havens*, 446 U.S. 620, 626 (1980).

This constitutionally unwarranted expansion of the Sixth Amendment severely disadvantaged the prosecution which did nothing improper in acquiring knowledge of these disclosures. Rather, it was Chmiel's post-sentence counsel who subpoenaed Attorney Kennedy to the 1988 ineffectiveness hearing and then proceeded to grill Kennedy on his stewardship over the first trial, questioning him as to why he failed to call Chmiel to the witness stand in his own defense at his first trial and present alibi testimony.

The Pennsylvania Supreme Court's decision has used the federal Constitution in an unintentionally perverted manner to undermine the truth determining function that is at the core of American jurisprudence when it precluded the jury from hearing legally obtained, trustworthy evidence probative of Chmiel's guilt of three first degree murders. In *Walder,* this Court stated that the failure to permit prosecution impeachment of Walder's false testimony would have been a "perversion of the Fourth Amendment". *Id.* at 65. However, in the instant case, the Pennsylvania Supreme Court's constitutional interpretation has

resulted in a "perversion" of the Sixth Amendment.

In *Walder,* the evidence was unlawfully obtained but still constitutionally useable for impeachment. *Id.* In the case at bar, the evidence was conceded by the Pennsylvania Supreme Court to have been legally acquired; yet its use as impeachment resulted in Chmiel being awarded a new trial primarily based on the rationale that the Sixth Amendment had been violated. If evidence unlawfully obtained under the Fourth Amendment, as in *Walder v. United States, supra,* and under the Fifth Amendment, as in *Harris v. New York, supra,* will not shield the accused in presenting perjurious testimony, it is just as important for the Court to declare that the Sixth Amendment, in the context of the prosecution's subsequent use of waived attorney-client disclosures triggered by an unrelated successful ineffective assistance of counsel claim, should likewise not allow unbridled perjury by the accused to decimate the search for truth in criminal trials. *Cf. Michigan v. Harvey, supra,* at 351.

The prosecution did not seek to invade Chmiel's attorney-client privilege in this case. The privilege was waived when Chmiel attacked his prior counsel's competence. To prevent use of the waived attorney disclosures on tortured constitutional grounds subverts the truth where the attorney-client privilege is indisputably waived and the communications are now a matter of public record. To the extent that the Pennsylvania Supreme Court is concerned about the dilemma a defendant faces in having confidential communications disclosed and perhaps used to impeach credibility at a later date if his quest for a new trial is successful is no different than any of the other innumerable situations where criminal defendants have to make choices whether to forego constitutional protections. That reality does not make the choice unconstitutional. Like the dissent (Pet.

App. 47a-49a), the petitioner believes it is improper to give criminal defendants a license to lie under oath. Chmiel could have presented only his alibi witnesses without also taking the witness stand to corroborate their testimony and the petitioner would not have been able to use Chmiel's statements to Attorney Kennedy to impeach those witnesses. By the time Chmiel corroborated his alibi under oath he knew that his defense had been publicly refuted by his former counsel and that, if he testified as to his claim, the prosecution would be permitted to impeach him. To say, under those circumstances, that the jury should have remained unapprised of that refutation should be declared by the Court as an affront to the truth determining function that a trial and cross-examination are supposed to achieve.

The Court has previously noted that it rejects the position that the existence of an attorney-client relationship "somehow independently trigger[s] the Sixth Amendment right to counsel." *Moran v. Burbine*, 475 U.S. 412, 429 n. 3 (1986). The inapplicability of any Sixth Amendment violation is even more readily apparent when the attorney-client privilege has been waived and the accused is being represented by new counsel who now is vigorously attacking the legal stewardship of his predecessor at an ineffectiveness hearing. In *Moran v. Burbine, supra*, at 450, the Court pointed out that

> the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the

> attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor...

The Pennsylvania Supreme Court erroneously wraps a protective cloak around Chmiel which effectively licenses him to commit perjury under the guise that his Sixth Amendment rights are violated simply because the prior inconsistent statements, used to impeach him, came from the mouth of his former attorney.

This raises the question whether this is an unwarranted expansion of the Sixth Amendment which the Court needs to review.

## II. THE USE OF HIS FORMER LAWYER'S TESTIMONY FOR IMPEACHMENT DOES NOT VIOLATE A CRIMINAL DEFENDANT'S FIFTH AMENDMENT RIGHT TO BE FREE FROM COMPELLED SELF-INCRIMINATION.

The majority opinion of the Pennsylvania Supreme court ultimately accepted Chmiel's argument that his "Fifth Amendment right to be protected against self-incrimination" was violated because the compelled disclosure of the statements that he had made in confidence to Attorney Kennedy at the ineffectiveness hearing resulted in "Kennedy [becoming] Chmiel incriminating himself." Pet. App. 34a. This ruling also raises the question whether this is an unwanted expansion of the Fifth Amendment which the Court needs to review.

The constitutional privilege against self-incrimination consists, for purposes of analysis, of three components: (1) the right of a witness not to incriminate himself; (2) the right of a defendant in a criminal trial not to take the witness stand at all; and (3) the right of such a defendant not to have his failure to take the stand commented upon. *U.S. ex. Rel. Miller v. Follette*, 278 F. Supp. 1003, 1006 ( E.D.N.Y. 1968) affirmed 397 F.2d 363 (2d.Cir. 1968) cert. den. in *Miller v. Follette*, 393 U.S. 1039, 89 S.Ct.660, 21 L.Ed.2d 585 (1969); *see also Tehan v. United States ex. rel. Shott*, 382 U.S. 406 (1966); *Griffin v. California*, 380 U.S. 609 (1965). If a criminal defendant takes the witness stand, he loses the privilege's protection. *See e.g. Raffel v. United States*, 271 U.S. 494, 497 (1926) (when the [defendant] ... takes the stand in his own behalf, he does so as any other witness... his waiver is not partial; having once cast aside the cloak of immunity he may not resume it at will).

Compelling Attorney Kennedy to disclose Chmiel's statements to him as the reason why he did not put Chmiel on the witness stand at his first trial or offer alibi witnesses does not violate Chmiel's Fifth Amendment protection from compelled self-incrimination. Chmiel was not compelled to do anything. It was Attorney Kennedy who was so compelled. The fact that Attorney Kennedy was the former agent of Chmiel does not change this result because the Fifth Amendment, as held repeatedly by the Court, "is limited to prohibiting the use of physical or moral compulsion exerted on the person asserting the privilege." *See Fisher v. United States*, 425 U.S. 391, 397 (1976) (internal quotations and cited cases omitted). No one compelled Chmiel to take the witness stand at his retrial. He did so, despite the fact that Chmiel knew that the trial court would permit the prosecution to impeach him with Kennedy's, not Chmiel's, testimony. Evidence that is presented in defense due

to the pressures caused by the strength of the prosecution's case does not constitute compelled self-incrimination against the defendant violative of the Fifth Amendment "even though the attempted defense ends in catastrophe for the defendant." *Williams v. Florida*, 399 U.S. 78, 84 (1970). The Court has noted that the "Hobson's choice" facing Chmiel which so concerned the Supreme Court of Pennsylvania majority does not raise any concerns of federal constitutional magnitude.*Id.* at 84-85. Nothing prevented Chmiel from declining to take the witness stand to corroborate the alibi (or abandon the alibi defense entirely) and thereby avoid what he knew would be damaging impeachment testimony. "[T]hese matters (decision to remain silent or abandon the defense) [were] left to his unfettered choice." *Cf. Id.*

The Court ought to correct these erroneous applications of the United States Constitution by the Pennsylvania Supreme Court resulting in the invalidation of a proper state court criminal conviction. *Cf. New York v. Ferber*, 458 U.S. 747, 767 (1982).

The Pennsylvania Supreme Court's decision squarely conflicts with *Harris v. New York, supra*; *Fisher v. United States*, *supra*; and *Williams v. Florida, supra*.

## III. CERTIORARI SHOULD BE GRANTED TO CLARIFY VARIOUS ANALOGOUS STATE AND FEDERAL DECISIONS RELATING TO THE QUESTION OF APPLICATION OF THE FIFTH AND/OR SIXTH AMENDMENT TO THE QUESTIONS PRESENTED.

Various federal and state court decisions have touched upon the questions presented here in a peripheral or more direct manner which have resulted in varied dispositions. *Cf. United States v. Schmidt*, 105 F.3d 82 (2nd Cir. 1997) (use of former counsel's testimony at sentencing against defendant did not violate Sixth Amendment where attorney-client privilege waived); *United States v. Edgar*, 82 F.3d 499 (1st Cir. 1996) (no Sixth Amendment implication where defendant's lawyer testifying before grand jury is not representing defendant in the criminal case even where court assumes *arguendo* that the attorney-client privilege has not been waived); *United States v. White*, 879 F.2d 1509 (7th Cir. 1989) (information obtained from defendant's former counsel and used by government did not violate the Sixth Amendment; Fifth Amendment right against compulsory self-incrimination claim waived and "it is far from clear that the proper remedy for violation of the attorney's duty of confidentiality is exclusion from the client's criminal trial of probative evidence obtained as an indirect consequence of that violation"); *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983) (waiver of defendant's state constitutionally mandated attorney-psychiatrist-client privilege permitted prosecution to present defendant's disclosures to defense psychiatrist without violating defendant's Fifth Amendment right against compulsory self-incrimination and his Sixth Amendment right to counsel); *Manley v. State*, 979 P. 2d 703 (Nev. 1999) (prosecution's cross-examination of capital murder defendant seeking to impeach defendant that he had not been truthful with his counsel violated defendant's Sixth Amendment right to counsel where attorney-client privilege was found not to be waived); *State v. Pawlyk*, 800 P.2d 338 (Wash. 1990) (defendant's Fifth and Sixth Amendment rights not violated where attorney-client privilege inapplicable); *Hutchinson v. People*, 742 P. 2d 875 (Colo.1987) (absent waiver of attorney-client privilege the use of defense

retained expert violates defendant's Sixth Amendment right to counsel); *People v. Clark*, 857 P. 2d 1099 (Cal. 1993) (use of defendant's disclosures to defense psychiatrist to impeach defendant's trial experts did not violate the defendant's Sixth Amendment right to counsel where defendant waived his attorney-client privilege); and *People v. Dennis*, 177 Cal. App. 3d 863, 223 Cal. Rptr.236 (Cal.App.1986) (implying that defendant's Fifth Amendment privilege against compulsory self-incrimination is violated if his testimony at an ineffective assistance of counsel hearing can be used against him if he wins a new trial).[3]

These are important questions of federal law that have not been, but should be, settled by the Court.

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[3] *Dennis* was the case principally relied upon by the Pennsylvania Supreme Court in its disposition of the instant case. Pet. App. 20a, n. 3. No applicable federal cases were cited by that court in support of its decision.

## CONCLUSION

For these reasons, the Commonwealth of Pennsylvania respectfully requests that the Court grant the petition.

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[J-92-1998]
**THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

DAVID CHMIEL,
Appellant

**No. 162 Capital Appeal Dkt.**

Appeal from the Judgment of Sentence entered March 14, 1995, in the Court of Common Pleas of Lackawanna County at 83-CR-748.

ARGUED: April 27, 1998

**OPINION**

**MR. JUSTICE SAYLOR DECIDED AUGUST 19, 1999**

Among the numerous issues raised in this appeal is the following: Did the trial court err in allowing the Commonwealth to introduce into the record of Appellant David Chmiel's second trial portions of the testimony given at an ineffectiveness hearing by Thomas Kennedy, Esq. (now deceased), counsel for Chmiel at his first trial? We conclude that the admission of such testimony was error and therefore reverse.

## I. Background

David Chmiel was charged with stabbing to death three elderly siblings, Angelina, Victor, and James Lunario, while robbing their home in Throop, Lackawanna County, in the early morning hours of September 21, 1983. In 1984, a jury convicted Chmiel of three counts of murder in the first degree and sentenced him to death. This Court reversed the convictions after finding that trial counsel (Attorney Kennedy) had been ineffective. *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9 (1994). Chmiel was retried in 1995. As before, he was convicted of three counts of first degree murder and sentenced to death. This direct appeal from that judgment of sentence followed.

The principal Commonwealth witness against David Chmiel at both the first and second trials was his brother, Martin Chmiel. According to Martin, David told him late in the summer of 1983 that he needed to obtain money quickly; he (Martin) told David that the Lunarios kept large sums of money in their home; and he and David then decided to break into the Lunarios' home in order to steal the money. While admitting that he participated in the planning of the break-in to the extent of fashioning ski masks for himself and David from the sleeves of an old sweater, Martin asserted that he subsequently changed his mind and had nothing further to do with the scheme. Martin testified that David confessed to him shortly after the murders that he had stabbed the Lunarios to death and stolen $5,300.00 from their home.

After the jury's verdict in the first trial, David Chmiel filed counseled post-trial motions as well as a *pro se* petition alleging that Attorney Kennedy had been ineffective for, *inter alia*, making no effort to locate alibi witnesses, discouraging him from taking the stand, and failing to request an accomplice

instruction as to Martin Chmiel's testimony. The trial court appointed new counsel, stayed the post-trial motions, and held an evidentiary hearing (treated as a hearing pursuant to the then-effective Post Conviction Hearing Act, 42 Pa.C.S. §§ 9541-9551) on the ineffectiveness claims. Following the hearing, at which Attorney Kennedy testified, the trial court denied David Chmiel's post-trial motions and formally imposed the sentence of death.

On direct appeal, this Court determined that Attorney Kennedy's failure to request an accomplice instruction with regard to the testimony of Martin Chmiel constituted ineffective assistance that prejudiced the defendant. Accordingly, the judgment of sentence was reversed and the case remanded for a new trial.

Prior to the retrial, David Chmiel (hereinafter "Chmiel") filed an omnibus motion requesting, *inter alia*, that the trial court preclude the use at trial of the testimony given by Attorney Kennedy at the evidentiary hearing in 1988.[1] The basis for the motion was that such testimony had impermissibly disclosed confidential attorney-client communications. Opposing the motion, the Commonwealth argued that Attorney Kennedy's testimony should be admitted for impeachment purposes in the event that Chmiel decided to take the stand. The trial court denied Chmiel's motion to preclude use of the testimony.

Although he did not testify at his first trial, Chmiel chose

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[1]This was a motion in limine, although not styled as such. *See generally Commonwealth v. Bazemore*, 531 Pa. 582, 584, 614 A.2d 684, 685 (1992).

to do so at his second. The crux of his testimony was that circumstances at the time of the killings strongly suggested to him that his brother Martin had committed the crime. Chmiel testified on direct examination that he had gone near the Lunarios' residence on only two occasions. The first occasion was in late June or early July of 1983, when he and Martin went there to "case the joint." The second occasion was early in September of that year, when he and Martin drove to the residence with the intent of burglarizing it; however, they abandoned the plan upon discovering that, contrary to their expectation, someone was at home.

Concerning his whereabouts on the night of the murders, Chmiel testified as follows: After having spent the day doing construction work on the home of Nancy and Tom Buffton, his sister and brother-in-law, Chmiel arrived home at about 4:30 p.m. Leaving there, he drove to the residence of Mike Cordaro, an electrical contractor to whom he owed money, in order to pay him. After paying Cordaro, Chmiel drove to North End Plumbing Supply to check prices, to a six- pack store to buy lottery tickets, and then to Betz's Bar, where he stayed until at least 11:00 p.m. From the bar he went to the Bufftons' house to check on tools that had been left there; to the home of a friend, Pat Battle, with whom he had a few beers; and to his brother Marty's house, where he learned from Marty's wife that Marty was not at home but was with Tom Buffton. After stopping at a donut shop and a mini-market, Chmiel went home. He went out once more to buy aspirin for his child. Then, he testified, he returned home to stay at 3:00 or 3:15 a.m.

As promised, the Commonwealth used Attorney Kennedy's testimony to cross- examine Chmiel concerning his whereabouts at the time of the murders. Because it is important

to understand the nature of such testimony and the use that was made of it, we quote at length the pertinent portion of the cross-examination.

Chmiel maintained that he had not been in the vicinity of the Lunario residence when the murders were committed and that he had "never ... told anybody anything different...." The prosecutor then asked:

> Q: Well, isn't it a fact, though, sir, for a period of five months starting with a conference with Mr. Kennedy on October the 5th that you maintained that you were on the scene at 1:00 o'clock in the morning and you tried to blame your brother because you said your brother was running from the scene?
>
> A: Yes.

Chmiel's positive answer to the prosecutor's question was apparently a mis- statement on his part, because immediately thereafter he asserted that he had gone to the Lunario residence only on the two occasions mentioned earlier. Cross-examination continued as follows:

> Q: Now tell me this, sir: Why for five months did you lie to Mr. Kennedy and say that you were on the scene of the crime at 1:00 o'clock in the morning on the 21st of September, that you saw Marty running out and you were going to blame Marty. And you said, Hey, Marty, and he got in the Toyota and drove

away. Why did you lie to Mr. Kennedy and give that phony story?

A: I did not lie to Mr. Kennedy. I never told him that.

...

Q: At [the evidentiary hearing] did you hear Mr. Kennedy testify as follows.... He's talking about different versions that you gave him. Do you remember him saying that you gave him three different versions of what happened? Do you remember him saying that?

A: Yes, I remember him saying that.

Q: Do you remember him saying, "The first version [given by Chmiel] of what had happened ... on the night of September the 21st ... included an admission by him that he was at the scene of the murder not for the purpose of robbing or killing but was there to case the joint. At that time the notes indicate that he saw a shadow, that he perceived it to be, at least he thought it to be his brother Marty, and that he called out, 'Marty', that the shadow ran down an alley of the Lunario house which he was casing, got into ... a car that Dave said he thought belonged to Tom Buffton. And [he gave] a description, I think it was a Toyota, a brown Toyota owned by Thomas Buffton." ... Now do you recall Mr. Kennedy testifying that way under oath?

A: Yes, sir, I do.

Q: He said that, didn't he?
A: Yes, sir, he said that at a hearing that I was questioning his ineffectiveness.

Q: So he lied is what you're saying?
A: I'm saying--I can't say he's lying. I'm saying I did not tell him that.

Q: In other words he just made this up?
A: Well, I don't know what he did. It's not what I told him.

Q: It's not what you told him; he just made it up. Isn't it a fact, sir, that he testified that you said to him ... he was ineffective because you wanted to testify to certain things and he said, he advised you not to go along with it because he did not want to be a party to perjury since you had given him three different stories. Do you remember him testifying that way?
A: He did say that at the ineffectiveness hearing, yes.

...

Q: He said that he didn't want you to get up and lie and he would not be a part of it?
A: He said that was one of the reasons he did not put me on the stand, that's right.

...

Q: And didn't he say, also, that you

maintained that position for five months, isn't that what he said?

A: He may have said that; that's probably what he said. I don't recall if he said five months, but he did say there was another version given later or something like that.

Q: There were two other versions given?

A: Yes, I think he said three.

Q: Three. As a matter of fact the version ... that you testified to yesterday is Version No. 2?

A: No, that's version [sic] from the very beginning; that's version No. 1.

Q: According to Mr. Kennedy's sworn testimony, what you had given him is Version No. 2?

...

A: Yes. That was at a hearing where I was questioning his effectiveness and his professionalism, and that's what he said, yes.

Q: Well, you were questioning his professionalism because he advised you not to get up on the stand and lie because you told him three different stories. That's what he said, right?

A: That's what he said--

Q: You wanted to get up on the stand and lie and he didn't want you to do that?

...

A: That's what Mr. Kennedy said, but that's not, that is not what I told him. I maintained from the very beginning, before the preliminary hearing to the bail hearing to the, every hearing I went to, right from the beginning, that the story I told yesterday, the version I gave yesterday, was the truth from the very beginning.

Q: So in other words this is just a pure fabrication? This is something that Mr. Kennedy dreamed up out of his imagination that you were there at 1:00 o'clock in the morning on the scene ... ?

A: I know I did not tell him that.

Q: Okay. Do you recall him saying this.... And he's talking about a conversation that he had with you where he's questioning you.... ["]Now tell me where you were at that period of time...." This is Mr. Kennedy testifying.

"We started at, I think I asked him to start at 8:00 o'clock in the morning, and minute by minute he told me where he was ... the whole day until ... [he] ends up in front of the Lunario house at or

around the time the murders were being committed. I said, 'Oh, my God, how do we handle this?' "

"That was changed a couple months later. He suddenly remembered he was elsewhere, and I've got to play the game, you know, I've got to get out there and structure an alibi with a witness who keeps changing. It's kind of a tough assignment." Do you remember Mr. Kennedy testifying that way?

A: Yes, vaguely I do, yes.

...

Q: So [Mr. Kennedy] swore unequivocally that you told him for a period of months that you were on the murder scene, isn't that right?

A: That's what he said at that hearing, yes.

Q: And not only that, but you were trying to blame your brother Marty, isn't that right?

A: That's not true.

Q: You were trying to blame your brother Marty by saying, I was there but I was just casing the place and Marty ran away and Marty got into this Toyota, Buffton's Toyota. So you were trying to put the blame on Marty.

A: No, sir.

Q: It was a lie, wasn't it?

A: No, sir, it was not a lie.

Q: All three stories were lies, Story No. 1, Story No. 2, and Story No. 3 are all lies?
A: There's only one story.

Q: You told story No. 2 according to Mr. Kennedy?
A: Yes, according to Mr. Kennedy--

...

Q: Now, do you recall that Mr. Kennedy said it wasn't until February the 11th of 1984 that you suddenly said, ... Whoops, I made a mistake. I wasn't there and I can account for all the different times. And I got witnesses lined up, right? Five months later you told him that?
A: No, sir.

Q: But that's what he said?
A: Yes, that's what he said, yes.

Q: That's what he said, but he's a lier [sic]?
A: He is lying. He said it at a hearing where I was questioning his effectiveness. ...

The prosecutor then cross-examined Chmiel concerning the testimony of the prosecution witnesses, suggesting that "we have a lot of people that seem to be lying here." After Chmiel acknowledged that his brother Martin had never told him that he (Martin) had murdered the Lunarios, the prosecutor returned to the subject of Attorney Kennedy's testimony.

Q: Now this was a matter that you discussed with Mr. Kennedy, wasn't it?

A: That's correct.

Q: Because at a later date you came up with Story No. 3 where you said, you know what, Mr. Kennedy, you know what I'm going to say now? I'm going to turn the tables on Marty. I'm going to say Marty told me he did it and he did it with Buffton and some girl named Judy ... isn't that right?

A: No, sir, that's not right.

...

Q: Let me put it to you very simply. You came up with Story No. 1 which was: I was on the scene, and you tried to concoct different stories and different lies, deciding what you're going to tell when you get on the stand. Story No. 1 was: I was on the scene at 1:00 o'clock in the morning. I'm going to blame Marty because I know that Marty is blaming me, so I'm going to say I saw him running away and get in the Toyota. That's Story No. 1. Five months later you come up with Story No. 2 which is: I was wrong about that. I wasn't on the scene, that I was at these other locations because you had time to get people together to put you at other locations, isn't that right?

A: No, sir.

Q: Then you say that after the preliminary hearing, after Marty testified against you, then you told him, didn't you tell him, Well, I'm going to turn the tables and I'm going to say that Marty told me he did it and he said that he and Buffton did it and they did it with a girl named Judy. Isn't that what you said?

A: No. Marty never told me he did it.

Q: I know that's what you're saying now, but that's Story No. 2 because I'm now reaching Story No. 3.

...

Q: Now you're aware that Mr. Kennedy said that you gave him a third version. And the third version was just that, that you claimed that Marty told you he did it. He testified to that under oath, didn't he?

A: Yes, he did.

Q: And he said that, I don't know what to do with this man. He's giving me three different stories. I can't put him on the stand to lie when he told me three different things. Isn't that what he said?

A: Yes, at that time--

Q: Of course he's a liar. He's a liar.

A: That's what he said. I did not tell him three different stories from the very first day; I told Mr. Kennedy what I remembered happened that night and

what didn't happen.

...

Q: Okay. Let me refer to page 462 of the notes. The testimony of Mr. Kennedy under oath. Okay. He says several months later you told him, "He knows who did the murders but he won't say who did it. Naturally at this point I got a little excited, I pressed him on it. He identified the killers as two men and one woman. My notes indicate who did it. And he now says that Marty told him on September the 21st, 1983, the day after the killings, or the afternoon of that day of the killings, ... that he, Marty, Tom Buffton, and Judy, I'm not sure who Judy was, did it. That Marty Chmiel, this is now coming five months later and it's a, 'me, too' defense. Marty said Dave did it, and five months later Dave says, Oh, Marty did it. He told me he did it." Do you remember him testifying to that?

A: Yes.

Q: So he says that was your Story No. 3, is that right?

A: Yes, that's what he said, yes.

Q: And do you remember him saying on page 464, "I didn't know what he would say on the stand because now I have three versions: A. He was up there to case the joint; B. He wasn't up there but

Marty--that he wasn't up there and he was at his friend's house; and, C. Marty did it.["] ... [D]o you remember him testifying to that?

A: Yes.

...

Q: Do you remember him saying this, on page 545, "I had the problem as a lawyer being told by my client what had happened here, and I had the problem of supporting perjury if I knew he was going to take the stand and testify as to something that was not true." Do you remember him saying that?

A: Yes.

Chmiel mounts a two-pronged attack upon the Commonwealth's use of Attorney Kennedy's testimony. First, he argues that Attorney Kennedy's disclosures were excessive in scope and improper given their procedural context. Second, he contends that the trial court abused its discretion in allowing the Commonwealth to utilize Attorney Kennedy's testimony at the second trial. As the basis for this claim, Chmiel asserts that the Commonwealth's use of Attorney Kennedy's testimony violated 42 Pa.C.S. § 5917, the codification in the criminal context of the former testimony exception to the hearsay rule. In addition, he contends that the testimony did not meet the requirements for admissibility established by this Court in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992). Finally, he asserts that admission of the testimony violated his state and federal constitutional rights to confront the witnesses against him, to be protected against compelled self-incrimination, to have the assistance of counsel, and to be afforded procedural due process.

Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court's decision on such a question absent a clear abuse of discretion. *Commonwealth v. Weber*, 549 Pa. 430, 436, 701 A.2d 531, 534 (1997). In addition, we will not reach Chmiel's constitutional issues if the appeal can be decided on another basis. *Commonwealth v. Baker*, 547 Pa. 214, 218, 690 A.2d 164, 165 (1997).

## II. Prior Counsel's Disclosure of Confidential Communications

It is undisputed that Chmiel's conversations with Attorney Kennedy were, and absent waiver would have continued to be, protected against compelled disclosure by the attorney-client privilege. Section 5916 of the Judicial Code, 42 Pa.C.S. § 5916, sets forth the privilege as it pertains to criminal matters in Pennsylvania.

> "In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."

42 Pa.C.S. § 5916. Although now embodied in statute, the attorney-client privilege is deeply rooted in the common law. *Commonwealth v. Sims*, 513 Pa. 366, 373, 521 A.2d 391, 394 (1987); *Commonwealth v. Maguigan*, 511 Pa.112, 124, 511 A.2d 1327, 1333 (1986). Indeed, it is the most revered of the common law privileges. *Maguigan*, 511 Pa at 124, 511 A.2d at 1333.

Nevertheless, a party who attacks the competence of his or her counsel cannot rely on the attorney-client privilege to prevent counsel from responding to such attack. *Loutzenhiser v. Doddo*, 436 Pa. 512, 519, 260 A.2d 745, 748 (1970); *Doll v. Loesel*, 288 Pa. 527, 533, 136 A. 796, 798 (1927); *Commonwealth v. Warren*, 264 Pa.Super. 274, 279 n. 6, 399 A.2d 773, 776 n. 6 (1979); *Commonwealth v. McKenna*, 206 Pa.Super. 317, 322, 213 A.2d 223, 226 (1965). In effect, the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue.[2]

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[2]As amended in 1995, the Post Conviction Relief Act specifically provides that "[w]hen a claim for relief is based on an allegation of ineffective assistance of counsel as a ground of relief, any privilege concerning counsel's representation *as to that issue* is automatically terminated." 42 Pa.C.S. § 9545(d)(3) (emphasis added). Although this statutory provision was not in effect in 1988, when the evidentiary hearing on Chmiel's ineffectiveness claims was held, there was already implicit in the case law the limitation that a client's attack on his former counsel's competence waived the privilege only as to the matter in dispute. *See Doll*, 288 Pa. at 533, 136 A. at 798 (finding that attack on attorney's integrity rendered admissible "at least part" of his testimony despite privileged nature of communications disclosed); *Warren*, 264 Pa.Super. at 279 n. 6, 399 A.2d at 776 n. 6 (finding that trial court had properly overruled appellant's objection, based on attorney-client privilege, to introduction at PCHA hearing of letter from appellant to former attorney, where letter confirmed attorney's testimony that appellant had sought to plead guilty in order to expedite sentencing); *see also Commonwealth v. Ferri*, 410 Pa.Super. 67, 75, 599 A.2d 208, 212 (1991) (finding that admission of former counsel's testimony

So much, Chmiel concedes. He contends, however, that Attorney Kennedy disclosed far more of his conversations with Chmiel than was necessary to rebut the allegations of ineffectiveness. Chmiel bases his claim on Rule 1.6(c)(3) of the Pennsylvania Rules of Professional Conduct, which provides that a lawyer whose representation of a client has been challenged "may reveal [confidential] information to the extent that the lawyer reasonably believes necessary" in order to respond to such a challenge. According to Chmiel, Attorney Kennedy could reasonably have responded to the allegations against him without disclosing that his client had given him three contradictory versions of the events in question.

Chmiel's argument is meritless. In response to the assertion that he had been ineffective in not calling Chmiel to the stand, it was appropriate for Attorney Kennedy to state his view that, because his client had told him more than one version of the events at issue, he risked suborning perjury if he allowed his client to testify. It was also appropriate for Attorney Kennedy to respond to the allegation concerning alibi witnesses by explaining that his client had rendered the search for such witnesses more difficult by giving more than one version of his whereabouts on the night in question. While Attorney Kennedy might have been able to explain his dilemma using fewer details, the disclosures that did occur fell within the scope of the waiver.

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was proper, where privileged communications were disclosed only to extent necessary to authenticate and establish chain of custody of non-privileged physical evidence), *appeal denied*, 534 Pa. 652, 627 A.2d 730 (1993), *cert. denied*, 510 U.S. 1164, 114 S.Ct. 1189 (1994).

Moreover, even if we were to assume for the sake of argument that Chmiel is correct, his claim would have established, at most, a basis for disciplinary proceedings against Attorney Kennedy. The rules that govern the ethical obligations of the legal profession (presently, the Rules of Professional Conduct) do not constitute substantive law. *In re Search Warrant B-21778*, 513 Pa. 429, 441 n. 5, 521 A.2d 422, 428 n. 5 (1987); *Estate of Pedrick*, 505 Pa. 530, 535, 482 A.2d 215, 217 (1984); *see also Rost v. State Board of Psychology*, 659 A.2d 626 (Pa.Cmwlth.) (addressing, in a disciplinary proceeding, a psychologist's breach of the duty of confidentiality), *appeal denied*, 543 Pa. 699, 670 A.2d 145 (1995). In addition, the discussion entitled "Scope" which precedes the Rules themselves states that "these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege." Accordingly, this claim is without merit.

Next, Chmiel challenges the trial court's finding that "the Defendant, by filing a PCHA petition in his first trial and including as grounds his prior counsel's failure to obtain alibi witnesses, opened the door for Attorney Kennedy's testimony...." According to Chmiel, he filed a post-trial motion alleging ineffectiveness, not a PCHA petition, and therefore the trial court's decision to designate the evidentiary hearing as a PCHA hearing was error. The gravamen of Chmiel's argument, apparently, is that it is the PCHA designation that determines whether counsel can reveal the confidences of a former client.

This argument is specious. Claims of ineffective assistance of counsel do not arise solely in the context of post-conviction proceedings. Such claims are often raised on direct appeal, and it cannot seriously be argued that the privilege would be waived in the former context but not in the latter. Regardless

of whether the trial court's choice of procedure was "extremely unorthodox" and "unwarranted," as Chmiel suggests, the fact remains that Chmiel challenged the competence of his former counsel. It is that fact, and not the characterization of the proceeding, which "opened the door" to Attorney Kennedy's testimony.

## III. The Commonwealth's Use at Trial of Prior Counsel's Testimony

Having determined that Attorney Kennedy was properly allowed to testify as to otherwise privileged communications from Chmiel in order to rebut Chmiel's allegations of ineffectiveness, we turn to the fundamental issue in this case: Was it error for the trial court to allow the Commonwealth to introduce such testimony into Chmiel's second trial? This is a question of first impression not only in this Commonwealth, but, apparently, in almost all other jurisdictions as well.[3]

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[3]The Court of Appeals for the Third District of California considered the issue generally in *State v. Dennis*, 177 Cal.App.3d 863, 223 Cal.Rptr. 236 (1986). In that case, the court acknowledged that when a defendant asks the trial court to set aside a jury verdict on the ground of ineffectiveness of counsel, he waives the attorney-client privilege as to the matters that he places in issue. Nevertheless, the court observed, "the information that defendant will be required to disclose in support of a new trial motion may conceivably lighten the burden which the prosecution bears in bringing about a conviction upon a new trial and therefore defendant's right against self incrimination is implicated." *Id.* at 874, 223 Cal.Rptr. at 243. Thus, the court

Before addressing Chmiel's arguments on this issue, we must determine the use that was made of the challenged testimony. As noted earlier, the Commonwealth asserted prior to trial that it would introduce the testimony for the purpose of impeaching Chmiel if he chose to testify, and in fact the Commonwealth did utilize the testimony for that purpose. Chmiel argues, however, that the testimony was effectively offered as substantive evidence since the trial court did not give any limiting instruction to the jury.[4]

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reasoned that to require a defendant to demonstrate prior counsel's ineffectiveness on the record was to risk imposing on the defendant "a compulsive sanction against the exercise of the self incrimination privilege." *Id.* at 874, 223 Cal.Rptr. at 243-44. In order to relieve defendants of such an untenable choice, the court held that a defendant "must be granted use immunity for disclosures he may make in support of a motion for a new trial on grounds of ineffectiveness of trial counsel." *Id.* at 876, 223 Cal.Rptr. at 245.

[4]Defense counsel did not ask for a limiting instruction, either at the time of cross-examination or prior to the court's charge to the jury. As this is a capital case, we conclude that the issue has not been waived. *See Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26 n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). Moreover, as will be discussed, defense counsel did object to the "consciousness of guilt" instruction that was given by the court on this issue.

Review of the jury charge reveals that the trial court gave two pertinent instructions to the jury. As part of its general instructions on credibility, the court stated the following:

> According to the evidence some of the witnesses made a statement on one occasion which appeared to conflict or contradict their testimony given at this trial. That would be when they were on the stand and they said one thing while testifying, then they were asked about something they said regarding the same thing on a prior occasion. You may consider the evidence of this other statement in deciding whether or not to believe this witness. You may, if you choose, regard this evidence as proof of the truth of anything that the witness said in the earlier statement.

Later in the charge, after having explained to the jury that circumstantial evidence alone may be sufficient to prove the defendant's guilt, the court said the following:

> We also want to caution you that there was evidence tending to show that the Defendant made false and contradictory statements. They were testified to by various witnesses in this case. So if you believe this evidence, you may consider it as tending to prove the Defendant's consciousness of guilt. You are not required to do so. You should consider

> and weigh this evidence along with all the other evidence in the case.

Obviously one example of Chmiel's "false and contradictory statements" was the varying accounts of his whereabouts contained in the testimony of Attorney Kennedy, which testimony was read to the jury by the prosecutor during his cross-examination of Chmiel.[5] Thus, the jury could fairly have found, based on the court's instruction, that such testimony constituted evidence tending to prove Chmiel's consciousness of guilt--in other words, substantive evidence. In light of this instruction, we do not agree with the trial court that Attorney Kennedy's testimony was used only for the purpose of impeachment.

As the Commonwealth acknowledges, the evidence in question involved two declarants, Chmiel and Kennedy, and was therefore hearsay within hearsay, or double hearsay. If double hearsay is to be admissible, the reliability and trustworthiness of each declarant must be independently established. *Commonwealth v. Scott*, 503 Pa. 624, 630, 470 A.2d 91, 94 (1983). This requirement is satisfied where each statement comes within an exception to the hearsay rule. *See Commonwealth v. Galloway*, 302 Pa.Super. 145, 158-59, 448 A.2d 568, 575 (1982); PACKEL AND POULIN, PENNSYLVANIA

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[5]In requesting the second of the quoted instructions, the Commonwealth explained that "what we are talking about there is the three versions that [Chmiel] gave with respect to Mr. Kennedy." The trial court suggested that the instruction would apply to the defendant's statements to his brother Martin. Over defense counsel's vigorous objection, the trial court agreed to include the Commonwealth's point for charge in its instructions.

EVIDENCE § 806 (1987) [hereinafter PENNSYLVANIA EVIDENCE].

In the present case, the Commonwealth maintains that Attorney Kennedy's testimony comes within the former testimony exception to the hearsay rule and that Chmiel's statements to Attorney Kennedy constitute party admissions, another hearsay exception. Although he does not directly address the hearsay rule, Chmiel indirectly challenges both of these assertions.

### A. Admissibility of Former Testimony Under 42 Pa.C.S. § 5917

We consider, first, Chmiel's claim that the Commonwealth's use of Attorney Kennedy's testimony violated Section 5917 of the Judicial Code, which reads as follows:

> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent

> trial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

42 Pa.C.S. § 5917. As noted earlier, Section 5917 codifies, in the criminal context, the former testimony exception to the hearsay rule. *See* PENNSYLVANIA EVIDENCE § 804.1.

This Court has held that in order for a witness's prior testimony to be admissible pursuant to Section 5917, the defendant against whom the testimony is to be admitted at a subsequent proceeding must have been afforded a full and fair opportunity to cross-examine the witness at the first proceeding. *Commonwealth v. Thompson*, 538 Pa. 297, 311, 648 A.2d 315, 322 (1994); *Commonwealth v. Bazemore*, 531 Pa. at 588, 614 A.2d at 687. This requires, essentially, that

> the issue remain the "same" in both proceedings.... This requirement is in accord with the common law rule that "the issues in the first proceeding and hence the purpose for which the testimony was there offered, must have been such that the present opponent (or some person in like interest) had an adequate motive for testing on cross-examination the credibility of the testimony now offered." MCCORMICK, EVIDENCE § 234 at 491 (1954); 5 WIGMORE, §§ 1386-88 (3 rd ed.1940).

*Commonwealth v. Velasquez*, 449 Pa. 599, 601 n. 3, 296 A.2d 768, 770 n. 3 (1972) (additional citations deleted). Addressing Section 5917's predecessor statute, the Act of May 23, 1887, P.L. 158, § 3, 19 P.S. § 582, the wording of which was in pertinent part identical to that of Section 5917, this Court interpreted the statute as requiring that the issues at both proceedings be "substantially the same." *Velasquez*, 449 Pa. at 601, 296 A.2d at 770.[6]

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[6]*See Id.* (holding, in case of defendant who obtained new trial on murder charge after having pled guilty, that testimony of unavailable witness from degree of guilt hearing was admissible at trial because in both proceedings the issue was whether defendant had acted with premeditation and without provocation); *Commonwealth v. Taylor*, 299 Pa.Super. 113, 122-23, 445 A.2d 174, 178-79 (1982) (holding that testimony of unavailable witness from witness's own trial was admissible at defendant's trial, as both had asserted entrapment defense involving same informant). *Cf. Commonwealth v. Munchinski*, 401 Pa.Super. 300, 316, 585 A.2d 471, 479 (1990) (holding that testimony from trial of unavailable witness and former co-defendant was not admissible at defendant's trial, as witness had presented insanity defense and Commonwealth's opportunity to cross-examine was limited to that issue alone), *appeal denied*, 529 Pa. 618, 600 A.2d 535 (1991); *Commonwealth v. DeMarco*, 332 Pa.Super. 315, 332, 481 A.2d 632, 640 (1984) (holding that transcript from Canadian extradition hearing was not admissible at the defendant's trial in Pennsylvania on criminal charges, despite adversarial nature of extradition hearing, because interests of Canadian authorities at hearing were substantially different from those of Commonwealth at trial).

Chmiel does not dispute that Attorney Kennedy was examined as a witness in a criminal proceeding before a court of record, or that he has since died. He contends, rather, that the ineffectiveness hearing did not address the same criminal issue as his subsequent trial on homicide charges. According to Chmiel, the issue at the evidentiary hearing was Attorney Kennedy's effectiveness at the first trial, and such issue does not imply the commission of a crime or the threat of criminal punishment; the issue at the second trial, in contrast, was Chmiel's guilt or innocence of three charges of murder in the first degree. Therefore, Chmiel argues, it cannot be said that the hearing afforded him a full and fair opportunity to cross-examine Attorney Kennedy on the issue that was fundamental to his second trial. We disagree.

The issue at the second trial, as at the first, was Chmiel's guilt or innocence of three charges of first-degree murder. The issue at the evidentiary hearing was Attorney Kennedy's effectiveness in defending Chmiel against those charges at the first trial. Central to both issues was Chmiel's credibility: Was he to be believed when he testified concerning his whereabouts on the night in question? As Attorney Kennedy's testimony on this issue was decidedly negative, Chmiel's motive for cross-examining Attorney Kennedy is readily apparent.

The fact that Attorney Kennedy would not face criminal punishment if found to be ineffective is, as to this issue, irrelevant. It was not the significance of the hearing to Attorney Kennedy that mattered, but the significance of the hearing to Chmiel. If Chmiel succeeded in demonstrating prior counsel's ineffectiveness with respect to the investigation of alibi witnesses, his own desire to take the stand, or any of the other asserted grounds, he would obtain a new trial (as, indeed, he did

on the ground of failure to request an accomplice instruction). A new trial would afford him not only a second chance for acquittal but also, failing that, a second chance at a sentence of life imprisonment rather than death. It was therefore in Chmiel's interest to impeach or disprove Attorney Kennedy's testimony concerning each and every allegation of ineffectiveness. Indeed, a more compelling motive for effective cross-examination is difficult to imagine. Therefore, as Chmiel had both the motive and the opportunity to cross-examine Attorney Kennedy at the evidentiary hearing, Section 5917 did not bar the admission of Attorney Kennedy's testimony at Chmiel's second trial.

Chmiel cites this Court's decision in *Commonwealth v. Mangini*, 493 Pa. 203, 425 A.2d 734 (1981), for the proposition that "countervailing principles" may preclude the admission of prior recorded testimony even though such testimony was otherwise admissible under Section 5917. The issue in *Mangini* was whether the testimony of a currently unavailable witness, given at the defendant's first trial, could be introduced at the defendant's second trial, where the second trial had been made necessary by prior counsel's ineffectiveness in failing either to request a competency hearing for the witness in question or to object to his competency on the record. This Court held that the testimony could not be so utilized, as "the use in the present trial of the very testimony which has been indelibly stamped with prior counsel's ineffectiveness is offensive to our sense of justice and the notion of fair play." *Id.* at 210, 425 A.2d at 738.

Chmiel asserts that the same result is required here. In *Mangini*, however, this Court cautioned that "our holding today is not a per se rule requiring exclusion of any testimony from a prior trial wherein trial counsel had been ineffective." *Id.* at 212, 425 A.2d at 739. The Court explained that, to the contrary, the

resolution of a similar claim in a different case would require an examination of "[a]ll of the factual variables ... to determine if the ineffectiveness so tainted the testimony sought to be introduced as to affect its reliability or to otherwise render its subsequent use unfair." *Id.* at 212, 425 A.2d at 738 (footnote omitted).

In the present case, prior counsel was found to have been ineffective at the first trial only because he did not request a particular jury instruction. Counsel's failure in that regard did not taint the evidence offered at the first trial. In any event, it was not testimony from the first trial that was introduced at the second trial, but prior counsel's testimony from the evidentiary hearing. Although prior counsel's ineffectiveness made such hearing necessary, it did not taint the testimony offered there.[7] Thus, neither case law nor logic warrants the extension of *Mangini* to the present situation.

### B. Admissibility of Former Testimony under *Lively*

Next, Chmiel argues that, under this Court's decision in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), Attorney Kennedy's ineffectiveness hearing testimony was inadmissible at trial because it was based on the attorney's notes of his conversations with Chmiel. We disagree.

The decision in *Lively* followed from the lead case of

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[7]The fact that the evidentiary hearing was necessitated by prior counsel's ineffectiveness is nevertheless relevant to our disposition in another respect. *See* Section III.C, *infra*.

*Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986), which held that prior inconsistent statements of a non-party witness may be used as substantive evidence where the declarant is a witness at trial and available for cross-examination. While acknowledging the traditional view that such statements were hearsay if offered for truth and, as hearsay, were too unreliable to be admitted as substantive evidence, this Court nevertheless concluded that since the witness in question would testify in court, where she would be under oath and subject to cross-examination, the acknowledged dangers of hearsay were largely nonexistent. *Id.* at 128-29, 507 A.2d at 69.

*Lively* limited the rule of *Brady* by holding that a prior inconsistent statement of a non-party witness may be used as substantive evidence only if it was given under highly reliable circumstances: 1) under oath at a formal legal proceeding; 2) reduced to a writing signed and adopted by the declarant; or 3) recorded verbatim contemporaneously with the making of the statement. *Id.* at 471, 610 A.2d at 8.

In the present case, Chmiel contends that Attorney Kennedy became a non-party witness for purposes of the second trial. Chmiel argues that because he did not adopt Attorney Kennedy's notes in any fashion, and in fact denied making the statements attributed to him by Attorney Kennedy, the notes themselves would be inadmissible. Therefore, he asserts, Attorney Kennedy's testimony should be inadmissible as well.

The principles of *Brady* and *Lively* are not relevant, however, unless the matter at issue involves the prior inconsistent statement of a non-party witness. Here, however, Attorney Kennedy made no prior inconsistent statement; only his testimony from the evidentiary hearing was utilized at Chmiel's

second trial. Therefore, Attorney Kennedy cannot be the non-party witness for purposes of a *Brady-Lively* analysis. Moreover, his recorded testimony, as noted earlier, was admissible under the former testimony exception as codified in Section 5917.

Chmiel did make prior inconsistent statements, in the form of his statements to Attorney Kennedy; and those statements were effectively allowed into evidence at his second trial. Chmiel, however, was not a non-party witness. To the contrary, he was the defendant, and his statements to Attorney Kennedy were admissible under the hearsay exception for party admissions. *Commonwealth v. Sherard*, 456 Pa. 505, 508, 321 A.2d 372, 373 (1974); *see also Galloway*, 302 Pa.Super. at 158, 448 A.2d at 575.

> [Party a][*sic*]dmissions ... are admissible because it is fair in an adversary system that a party's prior statements be used against him if they are inconsistent with his position at trial. In addition, a party can hardly complain of his inability to cross-examine himself. A party can put himself on the stand and explain or contradict his former statements.

PENNSYLVANIA EVIDENCE §805 (footnotes omitted). In sum, as the reliability concerns underlying *Brady* and *Lively* are not present here, the *Brady-Lively* precedents pose no barrier to the admissibility of Attorney Kennedy's testimony.

### C. Asserted Denial of Constitutional Rights

Chmiel argues that even if the Commonwealth's use at

trial of Attorney Kennedy's testimony surmounted the statutory and common law bars to admissibility, it cannot overcome the hurdle of constitutionality. Among the constitutional rights violated by the use of such testimony, Chmiel contends, was the right, guaranteed him by the Sixth Amendment to the United States Constitution[8] and Article I, Section 9[9] of the Pennsylvania Constitution, to confront the witnesses against him.

Although the hearsay rules and the federal Confrontation Clause are generally designed to protect similar values, the overlap is not complete. *California v. Green*, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970). The United States Supreme Court "has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross- examination.'" *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965)).

In *Roberts*, the Supreme Court explained that "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." *Id.* at 65, 100 S.Ct. at 2538. First, it establishes a "rule of necessity": in the usual case, "the prosecution must either produce, or demonstrate the

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[8]"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...."

[9]"In all criminal prosecutions the accused hath a right ... to meet the witnesses face to face...."

unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* Second, once the declarant is shown to be unavailable, the Clause requires that the declarant's statement be shown to bear adequate "indicia of reliability" if it is to be admitted into evidence. *Id.* at 66, 100 S.Ct. at 2539.

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

*Id.* (footnote omitted).

While it is thus within the realm of possibility that an otherwise admissible out-of-court statement could run afoul of the defendant's constitutional right to confrontation, Chmiel has failed to demonstrate that this has occurred in the present case. The witness in question was unavailable; the witness's testimony met the requirements for admissibility set forth in Section 5917 of the Judicial Code, including the requirement that Chmiel be given a full and fair opportunity to cross-examine the witness; and Chmiel's statements to the witness came within the recognized hearsay exception for party admissions. As Chmiel's argument for inadmissibility under the federal Confrontation Clause is not distinguishable from his argument for inadmissibility under Section 5917, his reliance upon the former is without merit.

Chmiel also maintains, correctly, that this Court has interpreted the Confrontation Clause of our state Constitution as

being more stringent than its federal counterpart. *Commonwealth v. Louden*, 536 Pa. 180, 187, 638 A.2d 953, 956-57 (1994); *Commonwealth v. Ludwig*, 527 Pa. 472, 478, 594 A.2d 281, 283-84 (1991). He does not assert that Section 5917 violates the state constitutional provision, however, but only that the procedure at issue in this case did not meet the requirements of Section 5917. In Section III.A, *supra*, we have found that argument to be meritless. Moreover, as this Court observed in *Ludwig*, "we have recognized exceptions to the constitutional right to confrontation ... only in those instances in which the accused has already had the opportunity to confront the witnesses against him face to face." *Id.* at 480, 594 A.2d at 284. Chmiel had such an opportunity at the evidentiary hearing. Accordingly, this issue requires no further consideration.

Chmiel also argues that the use of Attorney Kennedy's testimony at his second trial violated his Fifth Amendment right to be protected against compelled self-incrimination.[10] He contends that through the compelled disclosure of the statements that he had made in confidence to Attorney Kennedy, "Kennedy became Chmiel incriminating himself."

At first blush, Chmiel's argument appears to be contradicted by case law. The defendant in *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982), chose to testify at his first trial but to remain silent at his second trial. At the second trial, the Commonwealth, over the defendant's objection, was permitted to admit into evidence certain portions of the

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[10]"No person ... shall be compelled in any criminal case to be a witness against himself...."

defendant's testimony at earlier proceedings, including the first trial, to show that he had made conflicting statements and thus to imply consciousness of guilt. This Court affirmed, explaining that

> [t]he fact that [the defendant] exercised his right of silence during the second trial did not insulate him from the consequences of his earlier testimony. It has long been recognized that testimony from an earlier trial may be introduced in the prosecution's case against a defendant regardless of whether that defendant takes the stand or not in the second proceeding.

*Id.* at 497, 447 A.2d at 256 (citations omitted). As the Superior Court had held in *Commonwealth v. House*, 6 Pa.Super. 92 (1897),

> [A defendant] cannot be compelled to give evidence against himself, but if he gives it voluntarily he cannot object to having it used against him. His constitutional privilege, as far as that testimony is concerned, is waived, and cannot be reclaimed in any subsequent trial of the same indictment.

*Id.*, 6 Pa.Super. at 104, *quoted with approval in Boyle*, 498 Pa. at 498, 447 A.2d at 256.

Of similar import, although involving a different

privilege, is the case of *Commonwealth v. Santiago*, 541 Pa. 188, 662 A.2d 610 (1995), *cert. denied*, 516 U.S. 1053, 116 S.Ct. 722, 133 L.Ed.2d 674 (1996). The defendant in that case argued that the trial court had erred in admitting psychiatric testimony, introduced in his first trial where insanity was the defense, into his second trial, where he did not assert such a defense. Citing its earlier decision in *Boyle*, this Court concluded that "because Appellant voluntarily waived the psychiatrist-patient privilege, 42 Pa.C.S. § 5944, by pursuing an insanity defense in his first trial, he may not reclaim the privilege in a subsequent trial." *Id.* at 197-98, 662 A.2d at 614 (footnote omitted).

These decisions imply that, absent other considerations, a right or privilege once waived is always waived and that the defendant who waives a right or privilege cannot thereafter object to the use that is made of the formerly privileged communications. Although Chmiel did not waive his attorney-client privilege directly, he did so indirectly for the purpose of demonstrating his prior counsel's ineffectiveness. The Commonwealth argues that the evidence that resulted from such waiver "no longer retain[ed] its privileged character once it was disclosed in open court for third parties to hear."

Chmiel argues, however, that another, crucial consideration was present in this case: his constitutional right to the assistance of counsel. He asserts that "it is precisely because he chose to exercise his right to effective counsel by challenging his former attorney's performance that he ended up in a quagmire of repercussions." One such repercussion, he maintains, was the violation of his Fifth Amendment right not to incriminate himself. "Does a defendant really have a right to effective assistance of counsel," he asks, "if, by challenging his attorney's performance, he runs the risk of having his confidences used

against him at a second trial?"

In effect, Chmiel posits that, if the trial court's ruling is affirmed, a defendant who was represented by ineffective counsel will face a constitutionally impermissible choice: he can challenge the effectiveness of prior counsel, at the risk that the confidences which will be disclosed in the process will be admitted against him at a second trial; or he can ensure that his statements to prior counsel remain confidential, at the cost of forgoing any possibility of a new trial at which he would be effectively represented.

The importance of the right to counsel requires that we give careful consideration to Chmiel's argument. For at least thirty-five years the right to counsel has been recognized as a fundamental right, one that is essential to the goal of ensuring that every criminal defendant receives a fair trial before an impartial tribunal. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 796-97, 9 L.Ed.2d 799 (1963). Moreover, "[i]t is axiomatic that a criminal defendant is constitutionally entitled to the effective assistance of counsel." *Commonwealth v. Kale*, 331 Pa.Super. 155, 161, 480 A.2d 291, 294 (1984) (emphasis added) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980)). It is a matter of grave concern, therefore, if a defendant in Chmiel's situation chooses not to seek the effective representation to which he is entitled because he fears that the price of success will be his compelled self-incrimination, through the testimony of prior counsel, upon retrial.

The rationale underlying the attorney-client privilege suggests that there is reason for such concern. The purpose of the privilege is not to further the fact-finding process, but to foster

a confidence between attorney and client that will lead to a trusting and open dialogue. *Sims*, 513 Pa. at 374, 521 A.2d at 394; *Maguigan*, 511 Pa. at 125, 511 A.2d at 1334. As explained by Professor Mechem in his treatise on the law of agency:

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;--that the attorney shall not be permitted, without the consent of his client,--and much less will he be compelled--to reveal or disclose communications made to him under such circumstances.

*Sims*, 513 Pa. at 373-74, 521 A.2d at 394 (quoting 2 MECHEM

ON AGENCY § 2297 (2d ed.1914)); *Maguigan*, 511 Pa. at 124-25, 511 A.2d at 1333- 34 (quoting same); *Slater v. Rimar, Inc.*, 462 Pa. 138, 148, 338 A.2d 584, 589 (1975) (quoting same).

It has been suggested that the reluctance of clients to disclose unfavorable information to counsel is even more pronounced in the criminal field. "In criminal cases, the difficulty of obtaining full disclosure from the accused is well known, and would certainly become an absolute impossibility if the defendant knew that the lawyer could be compelled to report what he had been told." 1 MCCORMICK ON EVIDENCE § 87 (4th ed.1992). The critical importance of the attorney-client privilege to the administration of the criminal justice system is indicated not only by its ancient lineage, but also by its codification in statute. "[T]he existence of a statutory privilege is an indication that the legislature acknowledges the significance of a particular interest and has chosen to protect that interest." *Commonwealth v. Wilson*, 529 Pa. 268, 282, 602 A.2d 1290, 1298, *cert. denied*, 504 U.S. 977, 112 S.Ct. 2952, 119 L.Ed.2d 574 (1992).

Given the concerns that mandate recognition of an attorney-client privilege, it is not unrealistic to suggest that use of testimony of prior counsel as in this case would have a chilling effect on defendants' exercise of their right to the effective assistance of counsel. Knowing of the possibility that his counsel may ultimately be required to testify against him,[11]

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[11]By happenstance, this case presents a situation in which prior counsel, having died, was not available to testify at the defendant's retrial. In the more usual scenario, prior counsel will be available to testify in person against the defendant.

a defendant may decide that counsel cannot be trusted with the most damaging information concerning his case; or he may decide not to challenge counsel's effectiveness, fearing that his ability to mount a successful defense at a second trial has been fatally undermined by the admissibility of his communications to prior counsel. The fundamental unfairness of requiring a defendant to choose either of those options is illustrated by the present case: the situation that such a choice seeks to avoid--the admission at a second trial of prior counsel's evidentiary hearing testimony--has occurred precisely because prior counsel was shown to have been ineffective.

Arguably a defendant can avoid such an undesirable result by limiting his disclosures to his attorney, or by raising only such ineffectiveness claims as will not lead to the disclosure of incriminating statements. Such argument, in our view, presupposes an unrealistic degree of foresight on the part of the defendant and unreasonably restricts his ability to prepare an adequate defense.

Accordingly, we hold that the policy inherent in the legislative recognition and judicial enforcement of the attorney-client privilege, as it implicates a defendant's exercise of the right to the effective assistance of counsel and to freedom from compelled self-incrimination, restricts the use as well as the scope of permitted disclosures. Just as an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations, so the client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges. The trial court's decision to the contrary in the present case was error.

Such error was not harmless unless the Commonwealth is able to prove beyond a reasonable doubt that the error did not contribute to the verdict. *Commonwealth v. Story*, 476 Pa. 391, 409, 383 A.2d 155, 164 (1978). On this record, the Commonwealth cannot do so. Martin Chmiel testified that David Chmiel confessed to having committed the murders; David testified that he did not commit the murders but that he believed that Martin had done so. Although the record contained circumstantial evidence to support Martin's testimony, the credibility of the principal witnesses was nevertheless crucial. The damaging effect of Attorney Kennedy's testimony on the credibility of David Chmiel is beyond dispute, and the admission of such testimony was therefore not harmless.

Our decision requires that we vacate the judgment of sentence imposed upon David Chmiel and remand for a new trial. In doing so, we note that "there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." *Green*, 399 U.S. at 164, 90 S.Ct. at 1938 (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). Given the extremely prejudicial nature of a defendant's prior inconsistent statements as testified to by the defendant's former counsel, we conclude that to ask the jury to consider former counsel's testimony for the purpose of impeachment but not as substantive evidence would be to ask the impossible. Accordingly, Attorney Kennedy's testimony shall not be utilized for any purpose at retrial.

The judgment of sentence is vacated and the case is remanded to the trial court for further proceedings consistent with this Opinion.

Mr. Justice Castille files a dissenting opinion in which Madame Justice NEWMAN joins.

Judgment entered

Dated: August 19, 1999

/S/_____
John W. Person, Esquire
Deputy Prothonotary

[J-92-1998]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

DAVID CHMIEL,
Appellant

**No. 162 Capital Appeal Dkt.**

Appeal from the Judgment of Sentence entered March 14, 1995, in the Court of Common Pleas of Lackawanna County at 83-CR-748.

ARGUED: April 27, 1998

**DISSENTING OPINION**

**MR. JUSTICE CASTILLE DECIDED AUGUST 19, 1999**

The majority holds that to allow the now deceased counsel's testimony from a prior ineffectiveness hearing to be used to impeach appellant at his second trial would violate appellant's Sixth Amendment right to counsel. The majority reasons that allowing the use of such testimony would result in criminal defendants having the Hobson's choice of deciding whether to disclose information covered by the attorney-client privilege for the purpose of proving an ineffectiveness claim, knowing that the disclosures could be used against them in a

later proceeding, or to refrain from bringing an ineffectiveness claim, thereby possibly giving up their right to the effective assistance of counsel under the Sixth Amendment. In so holding, the majority is effectively permitting appellant to resurrect a waived attorney-client privilege in order to prevent counsel's sworn testimony from the ineffectiveness hearing to be used to impeach appellant's perjurious testimony at his second trial. I respectfully dissent because subsequent use of this testimony (which was initially obtained pursuant to a waiver of the attorney-client privilege and made part of the public record on a meritless ineffectiveness claim) does not implicate appellant's Sixth Amendment right to counsel. The right to effective assistance of counsel does not encompass the right later to testify falsely under oath once the ineffectiveness claim has been asserted.

Initially, appellant sought to prevent the disclosure of his trial counsel's testimony, arguing that the attorney-client privilege barred such disclosure.[1]

It is axiomatic that the attorney-client privilege is intended to foster candid communications between legal counsel and the client so that counsel can provide legal advice based upon the most complete information possible from the client. The historical concern has been that, absent the attorney-client privilege, the client may be reluctant to fully disclose all the facts necessary to obtain informed legal advice if these facts may later be exposed to public scrutiny.

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[1]The attorney-client privilege is codified at 42 Pa.C.S. § 5916.

The attorney-client privilege, however, is not an absolute privilege. The privilege is not available to protect attorney-client communications where the client attacks the effectiveness of the attorney's representation. *Loutzenhiser v. Doddo*, 436 Pa. 512, 518, 260 A.2d 745, 748 (1970). In addition, once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived. *See United States v. Fisher*, 692 F.Supp. 488, 494 (E.D.Pa.1988)(any voluntary disclosure by the holder of the privilege that is inconsistent with the confidential nature of the relationship thereby waives the privilege).

Here, appellant challenged trial counsel's stewardship after his first trial, by alleging, *inter alia*, that his trial counsel was ineffective for failing to call him as a witness on his own behalf and for failing to present certain alleged alibi witnesses. In order to rebut the charges of ineffectiveness, trial counsel testified under oath at the evidentiary hearing on his effectiveness that he chose not to present appellant as a witness or to pursue an alibi defense because appellant, in preparation for trial, had told him three contradictory versions of his whereabouts at the time of the crime. Specifically, trial counsel testified that appellant first told him that he was near the victims' residence, casing it out for a future robbery, when he saw his brother, Martin Chmiel, emerge from the house, run down an alley, and disappear into a waiting car. Five months later, appellant informed trial counsel that he had not been at the crime scene that night at all, but rather was in the company of various other persons throughout the course of the night. Appellant's third statement regarding the killing was that his brother had confessed to him that he and two accomplices had killed the victims.

Notwithstanding the disclosure of these communications in open court that included appellant's initial statement that he had been at the crime scene on the night of the murders, appellant took the stand at his second trial and testified that he had not been in the vicinity of the crime scene when the murders were committed. The Commonwealth then sought to impeach appellant with trial counsel's testimony from the ineffectiveness hearing where counsel testified that appellant told him that he had been present at the crime scene.

The trial court allowed such cross-examination. The majority now finds that the trial court erred in so doing because such practice would have a "chilling effect" on a party's assertion of his Sixth Amendment right to effective counsel. Thus, the issue becomes whether otherwise public, relevant information which would bear directly upon appellant's credibility should be excluded from a subsequent trial because the information was made public in order for appellant to raise an ineffective assistance claim. I would allow such communications to be used against the defendant at a later proceeding.

A defendant's Sixth Amendment right to counsel entitles him to allege and attempt to prove that his counsel was ineffective during the course of the representation. Apparently, the Majority here believes that, by allowing appellant's trial counsel to furnish impeachment testimony at his retrial, there would be a chilling effect on appellant's right to the effective assistance of counsel by, *inter alia*, rendering it less likely that he would ever choose to bring an ineffectiveness claim in the first place following a finding of guilt. As a matter of logic, the Majority's reasoning is quite simply incorrect, for reasons which I state below. As a matter of policy, the Majority's reasoning troubles me greatly, as I believe it is tantamount to placing this

Court's judicial imprimatur on the practice of perjury in the Commonwealth.

First, appellant himself has defeated the notion that he would not bring a claim of ineffective assistance knowing that his attorney might be allowed to provide impeachment testimony against him if he won a retrial and then tried to change his defense. Quite simply, appellant did bring an ineffectiveness claim under such circumstances. It is inconceivable to me that this Court would order a new trial on the basis of a "chilling" of appellant's Sixth Amendment right when appellant quite clearly exercised that right as vigorously as it can be exercised. Moreover, it is equally inconceivable that any criminal defendant in appellant's situation would ever decline to bring a meritorious claim of ineffective assistance on the grounds that such a course of action might impair the defendant's freedom of imagination in the event that the defendant won a new trial. I do not believe I am making a bold prediction when I suggest that defendants will find the alternative of death by lethal injection to be less palatable than the prospect of bringing a claim of ineffective assistance while knowing that they will not be able to concoct a new story inconsistent with what they have already told their attorneys. Consequently, I believe that the Majority's concerns related to the putative chilling effect on appellant's Sixth Amendment rights are logically unsound.[2]

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[2]To the extent that the Majority rests its decision on the chilling effect on a defendant's ability to be candid with his attorney in the first instance, I would note again that the unsettled state of the law in this area did not exactly impair appellant from testing out with his attorney the various versions of his defense. Moreover, affirmation in this matter would have

Second, I am troubled by what I perceive to be the policy ramifications of the Court's decision. It is beyond peradventure that the attorney-client privilege is waived when a criminal defendant brings a claim of ineffective assistance of counsel. Essentially, the Court's decision today resuscitates the already-waived attorney-client privilege under the guise of protecting the defendant's Sixth Amendment right to effective assistance of counsel and concomitant right to seek a new trial. What the Court is really protecting, however, is not the right of a criminal defendant simply to seek a new trial, but rather the right to seek a new trial in which he is free to commit perjury without consequences. The attorney-client privilege should not provide a cloak of immunity for such a nefarious purpose. Once the privilege is waived for purposes of an ineffectiveness claim, it should remain waived for purposes of cross-examination in a second trial, rather than act as a shield which prevents the

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no chilling effect whatsoever on the ability of any criminal defendant to be candid with his attorney, since the only purpose behind the Commonwealth's use of trial counsel as an impeachment witness was to show either that appellant was not candid with his attorney or else that he was not candid with the Court under oath. If appellant tells his attorney the truth and tells the Court the truth on retrial, then there will be no purpose to calling the attorney as an impeachment witness, and the spirit of full candor will be vindicated. By prohibiting the attorney from testifying in these circumstances, this Court necessarily condones one of two things: either a duplicitous relationship between the defendant and his trial counsel or a duplicitous relationship between the defendant and the Court.

factfinder from being exposed to the defendant's naked perjury. The purpose of the privilege is to promote candor with one's attorney; the only situation in which an attorney will be called as an impeachment witness is a situation like this in which the defendant has already abused the concept of candor (by lying to either the attorney, the court, or both) and, therefore, subverted the very basis for assertion of the privilege in the first place. To be succinct, judicial expansion of the traditional attorney-client privilege is inappropriate at best when the very point of the expansion seems to be to facilitate the deception of the judicial system itself by prevaricating defendants. Accordingly, I believe that policy considerations militate heavily against the decision of the Majority.

In sum, for reasons of logic and of policy, I would affirm the judgment of sentence. I respectfully dissent.

Madame Justice Newman joins this dissenting opinion.

**IN THE COURT OF COMMON PLEAS**
**OF LACKAWANNA COUNTY**
**CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID CHMIEL,
Defendant

**83 CR 748**

**OPINION**

**COTTONE, S. J.**

On March 5, 1995, the Defendant, David Chmiel, was found guilty, *inter alia*, of the September 21, 1983 first degree murders of James and Victor Lunario and their sister Angelina Lunario. This was the Defendant's second trial, the verdict in his first trial having been reversed by the Supreme Court due to alleged ineffective assistance of counsel.

The Defendant filed timely post-sentence motions seeking a new trial or, in the alternative, arrest of judgment. This Court will address the issues raised by the Defendant in his brief in support of these motions, *seriatim*.

The Defendant initially asserts that this Court erred in allowing the Commonwealth to introduce into the record for impeachment purposes the prior recorded testimony of Thomas Kennedy, Esquire, the Defendant's trial counsel at his first trial.

Attorney Kennedy was unavailable at the Defendant's second trial, due to his death.

The Defendant's attack on this testimony is multi-pronged. First, the Defendant submits that by allowing Attorney Kennedy's Post Conviction Hearing Act (PCHA) petition testimony to be introduced at trial this Court violated Rule 1.6(c)(3) of the Rules of Professional Conduct.

Rule 1.6(c)(3) states, in relevant part, that:

> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
>
> * * *
>
> (3) to establish a claim or defense on behalf of the lawyer in the controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceedings against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representations of the client.

The *Comment* to Rule 1.6 notes that the fundamental purpose behind this rule is to protect the client-lawyer relationship by maintaining confidentiality of the information relating to the relationship. This rule has been adopted to "encourage [a client] to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject

matter." *Comment*, Rule 1.6.

The Defendant first contends that it was inappropriate for the trial court at the PCHA hearing to order Attorney Kennedy to divulge confidential communications. He asserts that it was Attorney Kennedy's discretion, not the court's, as to whether and how much he revealed of attorney-client communications.

However, this argument ignores the directive stated in the *Comment* to Rule 1.6 which provides:

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6 (a) requires the lawyer to invoke the privilege when it is applicable. *The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.* (emphasis added)

The PCHA record indicates that Attorney Kennedy invoked the attorney-client privilege which the defendant refused to waive. The trial court then directed Attorney Kennedy to answer the questions posed concerning his effective assistance in Mr. Chmiel's first trial.

One of the Defendant's contention raised in his PCHA petition filed in connection with his first trial was that Attorney Kennedy made no effort to locate alibi witnesses. In order for Attorney Kennedy to appropriately respond to this allegation, he had to identify what efforts he did make in attempting to locate alibi witnesses and why those efforts were of a limited nature.

In the course of doing so, Attorney Kennedy testified that the Defendant provided him with three distinct versions of his activities on the night of the crime. It was this testimony that the Commonwealth introduced at the Defendant's second trial in an effort to impeach his credibility. The defendant contends that this Court erred in permitting the introduction of this testimony.

Mr. Chmiel argues that Attorney Kennedy should have curtailed his answer when he responded to his charge that he failed to procure alibi witnesses. He contends that Attorney Kennedy should merely have stated that unsuccessful attempts were made to locate certain alibi witnesses. However, this Court does not believe that by merely providing this suggested response, Attorney Kennedy would have adequately answered the Defendant's ineffective assistance charge for failing to obtain alibi witnesses. Details of the specific efforts that were made by trial counsel, we believe, were appropriate. The Defendant cites the testimony by Robert Borthwick, Esquire, co-counsel in the Defendant's first trial, as an example of how Attorney Kennedy should have responded. However, our review of Attorney Borthwick's testimony at the PCHA hearing regarding attempts to obtain alibi witnesses indicates that he was not able to expand on his response because he had no recollection of Mr. Chmiel's alibi. His responses, therefore, were necessarily curtailed due to lack of memory.

Generally, where an attorney's conduct has been challenged, admission of an attorney-client communication is deemed proper for the purpose of defense. *Commonwealth v. Warren*, 264 Pa. Super. 274, 279, n. 6, 399 A.2d 773, 776, n. 6 (1979); *See also Doll v. Loesel*, 288 Pa. 527, 136 A. 796 (1927).

This Court believes that the Defendant, by filing a PCHA

petition in his first trial and including as grounds his prior counsel's failure to obtain alibi witnesses, opened the door for Attorney Kennedy's testimony concerning certain information provided to him and his efforts to follow up on that information. By doing so, we believe that the attorney-client privilege was effectively waived by the Defendant. Admission of Attorney Kennedy's PCHA hearing testimony, therefore, did not violate Rule 1.6(c)(3).

The defendant next argues the PCHA testimony of Attorney Kennedy should have been disallowed at the second trial for a variety of other reasons. First, the Defendant submits that the use of prior recorded testimony of a witness now unavailable is prohibited where defense counsel at this prior trial was found ineffective. The Defendant's reliance on *Commonwealth v. Mangini*, 493 Pa. 203, 425 A.2d 734 (1981) in support of this position is, however, misplaced.

In *Mangini*, trial defense counsel was found ineffective for a number of reasons including his failure to request a competency hearing for the Commonwealth's key prosecution witness, without whose testimony the Commonwealth's case consisted entirely of circumstantial evidence. His counsel was aware that this witness was diagnosed as paranoid-schizophrenic and was on antipsychotic medication. The defendant was granted a new trial due to his prior trial counsel's ineffective assistance. Due to the fact that he was found incompetent to testify at the second trial, the Commonwealth sought to introduce this witness's testimony from the first trial. The *Mangini* court held that the use in the defendant's trial of the testimony which had been stamped with his prior counsel's ineffective assistance was offensive to the court's sense of justice and fair play. The Supreme Court concluded that, given the facts presented,

fundamental fairness will not permit the use of such testimony.

The matter *sub judice* is clearly distinguishable from *Mangini*. Here, the Commonwealth introduced the prior recorded testimony of the Defendant's former *trial* counsel. There was no assertion that his PCHA counsel was ineffective. Rather he was quite effective having obtained a new trial for the Defendant. There was no effort by the Commonwealth to introduce testimony from the Defendant's first trial, which testimony may have been tainted by the ineffective assistance claim.

Next, the Defendant asserts that this Court erred in allowing Attorney Kennedy's PCHA's testimony since it was derived from his personal notes. In support of this position, the Defendant relies upon *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992) which states that prior inconsistent statements of a non-party witnesses may be used as substantive evidence only when the statements are given under oath at a formal legal proceeding, or the statements have been reduced to writing signed and adopted by the witness, or are statements that are a contemporaneous verbatim recording of the witness's statements.

Since *Lively* addresses the use of non-party inconsistent statements as substantive evidence, it is inapplicable to the instant action. The statements introduced by the Commonwealth were attributable to the Defendant himself, not to a non-party. Furthermore, there [*sic*] were offered for impeachment purposes and not as substantive evidence. The Supreme Court in *Lively* specifically noted that the admission of prior inconsistent statements for impeachment purposes was not an issue in the case. *Id.* at 466, n. 1, 610 A.2d at 8, n. 1. Thus, Mr. Kennedy's testimony is not precluded by *Lively*.

The Defendant also contends that his prior recorded testimony was not admissible because his opportunity to cross-examine Attorney Kennedy, now deceased, on his guilt or innocence was inescapably foreclosed.

As a general rule, the admissibility of evidence is a matter within the sound decretion [*sic*] of the trial court and absent a finding of an abuse of that discretion, the trial court's rulings on admissibility will not be overturned. *Commonwealth v. Wharton*, 530 Pa. 127, 607 A.2d 710 (1992). Hearsay statements, out-of-court statements offered in court to prove the truth of the matter asserted therein, are generally inadmissible as evidence because the declarant's competency and credibility cannot be challenged. *Commonwealth v. Bujanowski*, 418 Pa. Super. 163, 613 A.2d 1227 (1992), *alloc. denied*, 533 Pa. 642, 622 A.2d 1374 (1993). "Exceptions to the hearsay rule have been fashioned to accommodate certain classes of hearsay that are substantially more trust worthy [*sic*] than hearsay in general, and thus merit exception to the hearsay rule." *Id.* at 169, 613 A.2d at 1230, quoting *Commonwealth v. Haber*, 351 Pa. Super. 79, 83, 505 A.2d 273, 275 (1986).

Both Pennsylvania common law and statutory law, 42 Pa. C.S.A. §5917, permits the admission of prior recorded testimony under certain circumstances.

42 Pa. C.S.A. §5917 states that:

> Whenever any person has been examined as a witness,either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been

> present and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent rial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

Certainly the death of Attorney Kennedy makes him unavailable to testify at the Defendant's second trial.

In determining whether prior recorded testimony should be admitted at a subsequent proceeding, the following must be present: (1) the witness responsible for that testimony is presently unavailable; (2) the defendant had counsel; and (3) the defendant had a full and fair opportunity to cross-examine the witness during the prior proceeding. *Commonwealth v. Smith*, 436 Pa. Super. 277, 286, 647 A.2d 907, 911 (1994). Furthermore, the issues in the earlier proceeding and the reason for which the testimony was there proffered "must have been such that the present opponent (or some person in like interest) had an adequate motive for testing on cross-examination the credibility of the testimony now offered." *Commonwealth v. Velasquez*, 449 Pa. 599, 601 n.3, 296 A.2d 768, 770, n.3 (1972) quoting McCormack, *Evidence* § 234 at 491 (1954).

The issue thus becomes whether the purpose for which Attorney Kennedy's testimony was proffered in both proceedings provided Mr. Chmiel with adequate motive for testing his credibility on cross-examination during the previous hearing. We believe so.

One of the issues raised in the Defendant's PCHA petition was that Attorney Kennedy failed to follow through on obtaining alibi witnesses. Responding to this charge Attorney Kennedy testified as to the information provided to him by the Defendant relative to his whereabouts on the night of the murders. In this context Attorney Kennedy described his efforts to procure alibi witnesses. The Defendant had an opportunity at this hearing to cross-examine Attorney Kennedy in order to test his credibility and the veracity of this testimony. At the Defendant's second trial, this testimony was introduced by the Commonwealth to impeach his credibility concerning his whereabouts on the night of the murders.

We do not believe that because the Defendant did not have the opportunity to cross-examine Attorney Kennedy regarding his guilt or innocence at this prior hearing, that this testimony should have been precluded. As noted, our courts allow prior recorded testimony of an unavailable witness from a separate and distinct hearing or trial to be utilized in another trial so long as the opponent had an opportunity to cross-examine the witness.

In *Commonwealth v. Taylor*, 299 Pa. Super. 113, 445 A.2d 174 (1982) the Superior Court held that the lower court erred in refusing to allow the defendant to introduce the prior recorded testimony of an unavailable witness from the witness's own trial. This witness, at his own trial on theft by deception

charges, asserted an entrapment defense, similar to that of the defendant in *Taylor*. The Superior Court concluded that the Commonwealth had an opportunity to cross-examine this witness at his own trial relative to this entrapment claim. The *Taylor* Court found that this witness's testimony tended to impeach the informant's testimony and thus may have influenced the jury's credibility determinations.

In *Commonwealth v. Velasquez*, *supra.*, the Supreme Court noted that the nature of the Commonwealth's evidence and the defendant's defense at both the degree of guilt hearing and his subsequent trial supported the conclusion that they were both proceedings involving substantially the same issues - did he with premeditiation *[sic]* and without provocation obtain a gun and with an intent to kill, shoot the victim. Thus, the prior recorded testimony of an unavailable witness who testified at the degree of guilt hearing which was later set aside was admissible at his subsequent jury trial. The Court focused on the *nature* of the unavailable witness's testimony and not the nature of the proceeding.

Since the Defendant was affored *[sic]* the opportunity to cross-examine Attorney Kennedy at the PCHA hearing and to test his recollection and credibility regarding the same areas of concern to him at his second trial, his motion for a new trial and/or arrest of judgment based upon this issue is denied. The nature of the testimony given by Attorney Kennedy was sufficiently similiar *[sic]* in both proceedings so as to allow for cross-examination by the Defendant at the prior hearing.

Next, the Defendant contends that this Court erred in allowing the Commonwealth to introduce evidence of his participation in a college course involving criminal

investigations.

The Commonwealth proffered the testimony of William Walsh, a former member of the Scranton Police Department, who stated that he had attended a criminal investigation course at the University of Scranton with the Defendant. He testified that his course involved instructions regarding protection of a crime scene, searching for and cataloging relevant evidence and searching for and lifting fingerprints. Mr. Walsh remembered telling either a member of the district attorney's office or the state police that the Defendant had taken this course with him.

The Defendant argues that this information was actually obtained as a result of a search of his residence.[1] He asserts that Mr. Walsh's testimony should have been suppressed under the fruit of the poisonous tree doctrine.

Both the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution protect persons against unreasonable searches and seizure. Evidence obtained from such unreasonable searches must be suppressed unless the Commonwealth can demonstrate that it was procured from an independent origin - a means other than the tainted source. *Commonwealth v. Melilli*, 521 Pa. 405, 555 A.2d 1254 (1989).

The record reveals that the Commonwealth obtained its knowledge that Mr. Chmiel had taken a criminal investigation

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[1]The course books and notebook obtained from the Defendant's residence during the search were suppressed because they were neither included in the search warrant nor were in plain view.

course independently from its search of his residence, that is, from Mr. Walsh and a tape recorded conversation with the Defendant's brother, Martin Chmiel. The Defendant contends that since there is no police report documenting the fact that Mr. Walsh conveyed this information to the police department, it could have only been obtained as a result of the search of his house.

It is incumbent upon the Commonwealth to demonstrate that the tainted evidence was procured from an independent origin. *Commonwealth v. Melilli, supra.* "[A]mmisibility *[sic]* will not lie where the road between the original tainted evidence and the poisoned fruit is direct and uninterrupted." *Id.* at 421, 555 A.2d at 1262.

This Court finds that the information was, in fact, obtained from an independent source. Although Mr. Walsh was unable to recall to whom he passed this information, he was able to recollect the facts and circumstances surrounding its passage. The Defendant's motion for a new trial and/or arrest of judgment is, therefore, denied.

The Defendant also asserts that this Court erred by improperly permitting the Commonwealth to utilize an arrest record involving Joseph Chmiel which resulted in no conviction. The Commonwealth asserts that the Defendant "opened the door" thus, allowing the introduction of burgarly *[sic]* charge on cross-examination.

The record reveals that Joseph Chmiel under cross-examination by the Commonwealth stated that he never stole anything and that if he could not buy something he did not want it. The Commonwealth then proceeded to question him

concerning a burglary arrest to which, without pleading guilty, the Defendant *[sic]* paid restitution. The Commonwealth incorrectly characterizes this testimony as the Defendant opening the door thus allowing it to delve into areas otherwise prohibited.

The veracity of a witness cannot be impeached by prior arrests which do not result in a conviction. *Commonwealth v. Taylor*, 475 Pa. 564, 381 A.2d 418 (1977). However, our courts have recognized that if a defendant delves into what would have been objectable *[sic]* testimony on the part of the Commonwealth, then the Commonwealth can probe into this objectionable area. *Commonwealth v. Stakley*, 243 Pa. Super. 426, 365 A.2d 1298 (1976).

The Commonwealth, however, is incorrect in its assertion that the defense opened the door to this line of questioning. Joseph Chmiel's statement that he never stole anything was not elicited by the Defendant. Rather, this comment was made during cross-examination by the Commonwealth. There was no opening of the door by the Defendant to otherwise inadmissible testimony.

However, we conclude that the cross-examination of Joseph Chmiel by the Commonwealth concerning this arrest was harmless error. A error is deemed harmless if a court is convinced beyond a reasonable doubt that the error could not have been attributable to the verdict. *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). Where the prejudice suffered was *de minimus*, or the erroneously admitted evidence was cumulative of other properly admitted evidence which was substantially similar to the erroneous evidence or the evidence of guilt was so overwhelming as established by proper and uncontradicted evidence that the prejudicial effect was

comparatively insignificant, an error will be deemed harmless. *Commonwealth v. Nolen*, 535 Pa. 77, 85, 634 A.2d 192, 196 (1993).

In this matter, *sub judice*, the Commonwealth attempted to impeach Joseph Chmiel's credibility by questioning him about his arrest for burglary which although did not result in a conviction, resulted in a payment of restitution by him.

The Defendant proffered Joseph Chmiel's testimony to implicate his brother, Martin Chmiel, in a discussion about stealing antiques owned by the Lunarios after their death. Our review of the record indicates that Joseph Chmiel was a minor witness in the overall case. Certainly, prejudice, if any, suffered by the Defendant was *de mininus [sic]*. The Defendant's motion for a new trial and/or arrest of judgment based upon this issue is without merit and is, therefore, denied.

The Defendant next contends that this Court erred in denying his request for jury instructions #16 and #17 pertaining to Martin Chmiel and Thomas Bufton's arson related convictions. The charge at issue is:

> You have heard the evidence that the prosecution witness, Martin Chmiel, has been convicted of a crime of conspiracy to commit arson. The only purpose for which you may consider this evidence of prior conviction is in deciding whether or not to believe all or part of Martin Chmiel's testimony. In doing so, you may consider the type of crime committed, how long ago it was

> committed and how it may affect the likelihood that Martin Chmiel has testified truthfully in this case. *Commonwealth v. Binghum*, 452 Pa. 554, 307 A.2d 255.

Jury instruction #17 concerned Thomas Bufton's arson conviction charge and was identical to #16 in all other respect.

As a general rule, evidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of conviction or the last date of confinement is within ten years of the trial date. *Commonwealth v. Randall*, 515 Pa. 410, 415, 528 A.2d 1326, 1329 (1987). Where, however, the prior conviction was for a crime not involving *crimen falsi*, it cannot be introduced. *Commonwealth v. Stokes*, 532 Pa. 242, 256, 615 A.2d 704, 711 (1992) A *crimen falsi* conviction must be for an offense involving dishonesty or false statement. *Commonwealth v. Randall, supra.* Unfortunately, "it is not always apparent which crimes fall within the ambit of *crimen falsi*." *Commonwealth v. Harris*, 442 Pa. Super. 116, 119, 658 A.2d 811, 812 (1995). In deciding whether a particular offense should be considered *crimen falsi*, a court is called upon to review both the elemental aspect of the offense and the witness's conduct which forms a basis of the anticipated impeachment. *Id.* at 120, 658 A.2d at 313 *[sic]*.

The Defendant argues that the motive underlying Martin Chmiel and Thomas Bufton's arson related charges was to defraud Mr. Bufton's insurance company in order to collect insurance proceeds. However, the record is insufficient to support such a conclusion.

A review of both Martin Chmiel's and Thomas Bufton's testimonies does not enable this Court to determine whether the arson and conspiracy to commit arson convictions were based upon a dishonest act. The record is void of any information that the arson was committed to profit from defrauding the insurance company insuring Mr. Bufton's house. *See*, *Commonwealth v. Kilgore*, 437, Pa. Super. 491, 650 A.2d 462 (1994) *rev'd on other grounds*, 1677 *[sic]* A.2d 311 (1995) *rev'd on other grounds*, 116 S.Ct. 2485 (1996). Since this Court was unable to conclude that these conviction involved dishonesty or false action, the refusal to give jury instructions #16 and #17 was not in error. We note that the jury was advised that both Martin Chmiel and Thomas Bufton had such convictions and thus were allowed to draw their own conclusions regarding their testimony.

The next argument advanced by the Defendant in support of his post-trial motions is that this Court erred in refusing to allow the Defendant to play recorded conversations involving Martin Chmiel, Thomas Chmiel and Nancy Burton.

The record indicates that the Commonwealth recorded conversations between these individuals during a reenactment of Martin Chmiel's alibi. Due to the poor quality of these tapes, the Defendant had had them enhanced. It was this enhanced version that the Defendant requested be played to the jury. The Commonwealth objected on the grounds of authenticity, relevancy and poor quality. The Commonwealth also argued that they would mislead and confuse the jury.

The admissibility of certain evidence is within the sound discretion of the trial court. *Commonwealth v. Bartlett*, 446 Pa. 392, 288 A.2d 796 (1972). This rule has been extended to include the admissibility of tape recordings. *Commonwealth v.*

*Wright*, 227 Pa. Super. 134, 323 A.2d 349 (1974).

Initially, this Court notes that it is very familiar with these tapes having been involved in Mr. Chmiel's case since its beginning. This Court had the opportunity to listen to them during his first trial. The decision not to admit these tapes was based upon their relevancy. As the record indicates, there is no statement made by any of the individuals on these tapes implicating them in the Lunario murders. The only statement identified by the Defendant as a possible relevant comment was one made by Mr. Bufton about covering for each other. However, the Defendant acknowledged that this comment did not directly refer to the Lunario murders and, as argued by the Commonwealth, could have referred to the arson of the Bufton home. We concluded that the admissibly *[sic]* of these tapes could possibly have confused the jury and offered no relevant evidence in this matter.

The Defendant's motion for a new trial and/or arrest of judgment based upon this issue is, accordingly, denied.

The Defendant argues next that this Court erred in refusing to allow him to cross-examine Martin Chmiel and Thomas Bufton about their burglary of a home on Rundle Street, Scranton. The Defendant asserts that he should have been allowed to question these individuals about this burglary in order to show their inclination and capacity to commit burglary without his involvement.

As noted previously, "Pennsylvania case law has long held that a witness may not be impeached by evidence of criminal activity for which the witness has not been convicted." *Commonwealth v. Cragle*, 281 Pa. Super. 434, 436-37, 422 A.2d

547, 548 (1980) (citations omitted). Although such evidence is inadmissible to prove the witness's bad character, it may be admissible for other evidentiary purposes if its probative value outweighs its tendency to prejudice the jury. *Commonwealth v. Pacell*, 345 Pa. Super. 203, 497 A.2d 1375 (1985).

In the matter *sub judice*, the Defendant sought to introduce this burglary by Martin Chmiel and Thomas Bufton not only in order to show their predisposition to commit burglary without his assistance or inclination, but also to show similarity of these matters. This Court does not believe that admission of this burglary would not outweigh its tendency to prejudice the jury. The mere fact that the home in Scranton and the Lunario home were burgarlized *[sic]* does not establish such a connection between these crimes to warrant the cross-examination desired by the Defendant. Neither was this burglary relevant to any sequence of events leading to the Lunario's murders. Finally, we note that the admission of this burgarly *[sic]* does not fit into the catagory *[sic]* of establishing a witness's interest in the immediate matter. A court may only admit such unconvicted bad act if there is an indictment against the witness and evidence that the prosecution could promise leniency. *Commonwealth v. Evans*, 332 Pa. Super. 301, 481 A.2d 625 (1984). The Defendant's motion for new trial and/or arrest of judgment on this ground is denied.

The Defendant asserts that this Court erred in barring him from calling Lt. Jordan of the Pennsylvania State Police to testify that Pennsylvania State Trooper Gerald Gaetano interviewed Nancy Chmiel and failed to file a report of said interview. Mr. Chmiel's defense was that the investigation of the Lunario murders, led by Trooper Gaetano, was steered away from implicating Martin Chmiel and Thomas Bufton. The Defendant

asserts that a friendship existed between, Martin Chmiel and Trooper Gaetano.

The Defendant maintains that Nancy Bufton (now Nancy Moran) during an interview with Trooper Gaetano contradicted Martin Chmiel's time of arrival at the Bufton's Holiday Inn room. He desired to call Lt. Jordan to testify that while he (Jordan) was interviewing Thomas Bufton in one room, Trooper Gaetano was interviewing Nancy Bufton in another room. The purpose of calling Lt. Jordan was to verify that Ms. Bufton was interviewed by Trooper Gaetano and to show that there was no report prepared of this interview.

The Commonwealth argues that this testimony was cumulative and unnecessary. We agree. The record indicates that Trooper Gaetano testified that he did not personally interview Nancy Bufton but that he may have spoken with her in September 1983. He did take a statement from her, however, in September 1984 which statement was proferred *[sic]* as Commonwealth's Exhibit 105. Finally, Ms. Bufton stated that she provided Trooper Gaetano with the same information as in her testimony at trial.

The Defendant was able to obtain the desired testimony from these witnesses. The necessity of calling Lt. Jordan was non-existent. The Defendant's motion for a new trial and/or arrest of judgment based upon this issue is denied.

The Defendant next contends that this court erred in barring him from implicating Robert Hannon and/or Paul DeGrazio in these murders.

The Defendant asserts that he should have been allowed

to question the police regarding what efforts, if any, they did in following up an anonymous letter implicating a Robert Hannon in the murders. However, as indicated in the record, the Defendant acknowledged that he had no other independent source linking Hannon to this crime. This Court believes that if the Defendant were allowed to inject Mr. Hannon's name into this trial without more than an anonymous hearsay letter would have misled or confused the jury. The decision to prohibit this line of questioning was not in error and the motion for new trial and/or in arrest of judgment based upon this issue is denied.

The Defendant also contends that he should have been allowed to place into evidence facts showing Paul DeGrazio possessed the motive and opportunity to commit these crimes. "It is well - established that proof of facts showing the commission of a crime by someone else is admissible." *Commonwealth v. Boyle*, 470 Pa. 343, 359, 368 A.2d 661, 669 (1977). However, in the matter *sub judice*, the Defendant offered no proof of facts showing Paul DeGrazio's alleged involvement. The mere fact that Mr. DeGrazio lived next to the Lunarios and owed Victor Lunario approximately $5000.00, without more, was not sufficient evidence to open the door to this line of questioning. Clearly this matter is distinguishable from *Commonwealth v. Boyle, supra.*, wherein there were sufficient facts implicating the defendant's two co-conspirators in the murders and who had motives independent of that of the defendant to commit the murders. The *Boyle* Court held that since these co-conspirators testimony was very important to implicating the defendant in the crime and credibility *[sic]* one of the co-conspirators was at issue, the defendant should have been allowed to question these individuals concerning relevant, material and competent evidence.

The circumstances in the instant action are such that the line of questioning sought by the Defendant would have only served to confuse the jury. The request for new trial and/or arrest of judgment on this issue is accordingly denied.

Finally, the Defendant asserts that this Court erred in striking from the record and barring any further testimony of Trooper Gaetano's alleged involvement in narcotics trafficing *[sic]*.

This Court properly disallowed the requested line of testimony since it was based upon not only hearsay testimony but also alleged unrelated criminal activity which has not resulted in a conviction. *See, Commonwealth v. Cragle, supra.* The Defendant's request for new trial and/or arrest of judgment based upon this issue is, therefore, denied.

Finally, the Defendant asserts that the trial judge should have recused himself due to the fact that his secretary/administrative assistant was married to Trooper Gaetano, a witness for the prosecution in this case

> "Where circumstances arise during the course of a trial raising questions of a trial judge's bias or imparticially *[sic]*, it is still the duty of the party, who asserts that a judge should be disqualified, to allege by petition the bias, prejudice or unfairness necessitating recusal. (citations omitted). A failure to produce a sufficient plea will result in a denial of the recusal motion. *Reilly by Reilly v. Southeastern Pennsylvania*

*Transportation Authority*, or *[sic]* 507 Pa. 204, 220, 489 A.2d 1291, 1299 (1985).

In the instant action, the Defendant raised in his post-trial motions a claim that the trial judge should have recused himself *sua sponte* from presiding over this trial. However, this Court believes that the Defendant suffered no bias or prejudice. First, the Defendant was tried by a jury, the fact-finder in this case. Thus, the jury verdict protected the fact-finder process. Secondly, and more importantly, the Defendant failed to file the recusal motion, even though he was advised of Trooper Gaetano's relationship with the trial judge's secretary.

"Once the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain the following *[sic]* an unfavorable result." *Reilly, supra.* at 222, 489 A.2d at 1300; *Commonwealth v. Satzberg*, 358 Pa. Super. 39, 516 A.2d 758 (1986). It is incumbent upon the party asserting bias or interest to file the appropriate motion and once the decision is final, the case must proceed. "The propriety of the decision is grounded in abuse of discretion and is preserved as any other assignment of error, should the objecting party find it necessary to appeal following the conclusion of the case." *Id.*

In the present action, the Defendant has *[sic]* sufficient opportunity to file a recusal motion prior to the jury verdict. He, however, waited until after the jury had found him guilty. He cannot now complain. *See, Commonwealth v. Satzberg, supra.*

As a general rule, in Pennsylvania a trial judge should recuse himself whenever he has any doubt as to his ability to

preside impartially in a criminal case or whenever he believes his imparticially *[sic]* can be reasonably questioned." *Commonwealth v. Goodman*, 454 Pa. 358, 361, 311 A.2d 652, 654 (1973) quoting from A.B.A. Standards Relating to the Function of the Trial Judge, § 1.7. The Defendant has failed to identify particular evidence of prejudice or bias displayed by this Court during the trial of this matter in support of his claim. Merely because a jury has found him guilty does not lead to the conclusion that this Court harbored a bias or prejudice against him because of Trooper Gaetano's marriage to the trial judge's secretary. The Defendant's motion for new trial/arrest of judgment on this issue is, accordingly, denied.

Finally, this Court notes that there are other issues raised by the Defendant in his post-sentence motions which were not briefed. Since issues raised but not briefed are deemed waived this Court will not address them.

**ORDER**

And now this 21st day of April, 1997, the Defendant's motion for post-trial relief is denied.

BY THE COURT:

S/ Cottone S.J.

For the Commonwealth: Robert Campolongo, Esq.
Senior Deputy Attorney General

For the Defendant: Gerald Grealish, Esq.

[J-280-1992]
**THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

DAVID CHMIEL,
Appellant

**No. 111 E.D. Appeal Docket 1991**

Appeal from the Orders entered on June 28, 1991, in the Court of Common Pleas Common Pleas of Lackawanna County, at Docket Number 83-CR-748.

ARGUED: October 22, 1992

**OPINION**

**JUSTICE ZAPPALA** **FILED: March 4, 1994**

Appellant David Chmiel was convicted of three counts of murder in the first degree, three counts of robbery, one count of burglary, and two counts of theft by unlawful taking. The jury at the sentencing hearing determined that Appellant should be sentenced to death. Post-trial motions were filed. Appellant then filed a *pro se* Post Conviction Hearing Act (PCHA) petition alleging ineffective assistance of counsel. The trial court appointed new counsel and stayed the post-trial motions. Following an evidentiary hearing, the trial court dismissed the

PCHA petition. Post-trial motions were argued and denied. Appellant was then formally sentenced to death for each of the murder convictions. Direct appeal from the judgment of sentence was taken to this Court pursuant to 42 Pa.C.S. § 9711(h).

In each case in which the death penalty is imposed, this Court is required to conduct an independent review of the sufficiency of the evidence, even where the defendant has not challenged the conviction on that ground. *Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986), *cert. denied*, 438 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987); *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), *reh'g denied*, 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983). The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt. *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986); *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987). This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Sullivan*, 472 Pa. 129, 150, 371 A.2d 468, 478 (1977); *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976).

On September 21, 1983, at approximately 1:30 a.m., Angelina, Victor and James Lunario were murdered in their

home located in Throop, Lackawanna County. All three victims had been stabbed repeatedly. Angelina was found sitting upright on the sofa in the living room, while James was found in his hospital bed also in the living room. Victor Lunario was found in his bedroom on the second floor of the house in Throop. Victor's and Angelina's bedrooms had been ransacked. On the floor in Victor's bedroom was a lock box which had been broken open. The lock box was surrounded on the floor with empty brown government envelopes with dollar amounts written on them totaling $4,256.25. Down the hall from Victor's bedroom, Angelina's bedroom had papers, shoe boxes, and jewelry strewn on the floor. In her bedroom closet was found a brown sweater sleeve which had been fashioned into a homemade ski mask.

The state police concentrated their investigation upon the brown sweater sleeve ski mask. Eventually, the police obtained a photograph of Martin Chmiel, Appellant's brother, who was wearing a sweater that looked similar to the brown sweater sleeve ski mask. Although Martin Chmiel had on a prior occasion denied any knowledge of the crimes, the state police once again questioned Martin and when the police confronted him with the photograph and the mask, Martin broke down and told the state police the same facts that he later testified to at trial, which was the Commonwealth's principal evidence in this case.[1]

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[1]Martin Chmiel had previously pled guilty to criminal conspiracy to commit arson and was sentenced to one to two years imprisonment. At the time of Appellant's trial, Martin Chmiel filed a Petition for Reconsideration of Sentence which was granted and his sentence was reduced. N.T. 1083-1085. The record also reveals that Martin Chmiel cooperated with the

Martin Chmiel related that in late August or early September, 1983, he and Appellant had a conversation in Appellant's automobile during which Appellant told Martin that Appellant needed "fast money." Martin told Appellant that there was money in the Lunario home in Throop, Pennsylvania. Appellant and Martin then made plans to rob the house in Throop. The brothers plotted to use masks during the robbery. Martin suggested that sleeves be cut off an old brown sweater that he had at home in order to make the masks.

Subsequently, Martin Chmiel once again met Appellant in Appellant's automobile to further discuss the robbery. Martin brought with him to this meeting the two sleeves that he had removed from his brown sweater. During their conversation, Martin continued to fashion the two ski masks from his sweater sleeves by using his fingers to make eye holes and tying a knot at one end of the sleeve and then trying one on to see if it fit. Martin left the two masks in Appellant's automobile.

It was Martin's testimony that either at the second meeting or shortly thereafter, he changed his mind about participating in the robbery. Nevertheless, Martin told Appellant what the Lunario house looked like, how to get to Victor Lunario's bedroom, and where money could be found in Victor Lunario's bedroom.

According to Martin, in the afternoon of September 21, 1983, Appellant told Martin that Appellant had killed the

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police investigation by wearing a body wire in an attempt to obtain Appellant's confession.

Lunarios and had taken $4,500.00 from a wooden box under Victor Lunario's night stand and $800.00 from Angelina's purse. Martin claimed that he had asked Appellant whether the masks were used. Appellant told Martin that a mask was used but Appellant had gotten rid of it and it would never be found.

As a result of the information provided by Martin Chmiel, Appellant was arrested on September 28, 1983, and charged with the crimes committed against the Lunarios.

In the early morning hours of September 29, 1983, the state police obtained from Martin Chmiel a dark brown and beige sweater with its arms removed and a blue and white flashlight. The blue and white flashlight appeared to be very similar to a flashlight found at the Lunario home on the morning the murders were discovered. Thereafter, that same morning, the state police executed a search warrant at Appellant's home. In a hutch in the dining room, the police officers found an envelope containing $2,400 in U.S. currency, some of which was bound in money wrappers.

Review of the facts of this case leaves no doubt that the evidence was sufficient for the jury to have determined that all elements of the crimes had been established beyond a reasonable doubt.

In his brief and argument before this Court, Appellant has raised numerous allegations of error. However, our resolution of just one of these claims convinces us that a new trial is necessary.

It is Appellant's contention that his prior counsel was ineffective for either failing to request an accomplice testimony

instruction or failing to preserve such an issue through layered ineffectiveness claims.[2] Appellant argues that the facts of this case clearly indicate that Martin Chmiel, the Commonwealth's chief witness, was an accomplice. Specifically, Appellant cites to Martin Chmiel's own trial testimony wherein Martin admitted that he intended to rob/burglarize the Lunario home; that he aided in the planning of the crimes; that he made masks from his own sweater which were used in the crimes; and that he provided Appellant with key information including the location of the Lunario home, the location of Victor's bedroom, as well as the location of money in Victor's bedroom.

The Commonwealth now asserts that Martin Chmiel lacked the intent to be an accomplice. However, even if the

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[2]At the time of Appellant's trial, the Accomplice Testimony instruction 4.01 of the *Pennsylvania Standard Jury Instructions: Criminal section* (Revised October 1981), provided, in pertinent part, as follows: ... These are special rules that apply to accomplice testimony: *First*, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source. *Second*, you should examine the testimony of an accomplice closely and accept it only with care and caution. *Third*, you should consider whether the testimony of an accomplice is supported, in whole or in part, by other evidence. Accomplice testimony is more dependable if supported by independent evidence. [However, even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis of an accomplice's testimony if, after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that the accomplice testified truthfully and the defendant is guilty.]

evidence would support such an inference, the Commonwealth argues that it was Appellant's trial strategy not to use an accomplice testimony instruction, which would necessarily implicate Appellant, but instead suggest to the jury that Martin Chmiel was the sole perpetrator of these crimes.

To prove ineffectiveness of counsel, Appellant must show that his assertion is one of arguable merit, that the attorney had no reasonable basis for his/her action or inaction, and that the attorney's action or inaction was prejudicial to the client. *Commonwealth v. Clark*, 533 Pa. 579, 626 A.2d 154 (1993), citing *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). The ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant. *Commonwealth v. Shannon*, 530 Pa. 279, 608 A.2d 1020 (1992), citing *Commonwealth v. Hubbard*, 472 Pa. 259, 276-277, n. 6, 372 A.2d 687, 695, n. 6 (1977).

The record reflects that Appellant's trial counsel, post-trial counsel, and appellate counsel are not the same person. While trial counsel failed to request an accomplice testimony instruction, Appellant's post-trial counsel also failed to preserve the issue for review through an ineffectiveness claim. Because appellate counsel has now for the first time raised a layered ineffectiveness claim, we find that the claim of trial and post-trial counsel's ineffectiveness for failing to request and preserve the issue of an accomplice testimony instruction is properly before us for disposition.

It is well established that in any case where an accomplice implicates the defendant, the judge should tell the jury that the accomplice is a corrupt and polluted source whose

testimony should be viewed with great caution. *Commonwealth v. Turner*, 367 Pa. 403, 80 A.2d 708 (1951); *Commonwealth v. Bubna*, 357 Pa. 51, 53 A.2d 104 (1942). For an accomplice charge to be required, the facts need not require the inference that the witness was in fact an accomplice; they need only permit such an inference. *Commonwealth v. Sisak*, 436 Pa. 262, 259 A.2d 428 (1969). If the evidence is sufficient to present a jury question with respect to whether the prosecution's witness was an accomplice, the defendant is entitled to an instruction as to the weight to be given to that witness's testimony. *Commonwealth v. Mouzon*, 456 Pa. 230, 318 A.2d 703 (1974). See also *[sic] Commonwealth v. Bricker*, 525 Pa. 362, 581 A.2d 147 (1990); *Commonwealth v. Upshur*, 488 Pa. 27, 410 A.2d 810 (1980); and *Commonwealth v. Thomas*, 479 Pa. 34, 387 A.2d 820 (1978).

Initially, we must review the evidence to determine if it permits an inference that Martin Chmiel was an accomplice.[3]

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[3]18 Pa.C.S. § 306 provides in pertinent part:
(a) General rule. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. (b) Conduct of another. A person is legally accountable for the conduct of another person when: (3) he is an accomplice of such other person in the commission of the offense. (c) Accomplice defined. A person is an accomplice of another person in the commission of an offense if: (1) with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it.... (f) Exceptions.--Unless otherwise provided by this title or by the law defining the

We review the evidence in the light most favorable to the Commonwealth as verdict winner below. *Commonwealth v. Burton*, 450 Pa. 532, 301 A.2d 599 (1973).

The testimony of Martin Chmiel was the piece of evidence linking Appellant to the murders of Angelina, Victor and James Lunario. It is this testimony which provides the essential facts from which we must decide if an inference can be drawn that Martin Chmiel was an accomplice.

Martin Chmiel's testimony reveals his own involvement in the events leading to the triple homicide. By his own admission, Martin Chmiel identified the Lunario home as the source for fast money. Martin Chmiel's intention to pursue the resulting criminal activity is clear from him making plans to rob the house in Throop. The extent of his commitment to these plans is evidenced by his use of the sleeves from his old brown sweater to fashion masks which were used in this criminal enterprise. Although he testified that he changed his mind about participating in the robbery, Martin Chmiel told Appellant what

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offense, a person is not an accomplice in an offense committed by another person if: (1) he is a victim of that offense; (2) the offense is so defined that his conduct is inevitably incident to its commission; or (3) he terminates his complicity prior to the commission of the offense and: (i) wholly deprives it of effectiveness in the commission of the offense; or (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

the Lunarios' house looked like, how to get to Victor Lunario's bedroom, and where in that bedroom the money was hidden.

Equally clear from his testimony is the fact that Martin Chmiel falls within none of the exceptions to the definition of an accomplice as set forth in 18 Pa.C.S. § 306(f). Although he allegedly terminated his complicity prior to the commission of the offenses, at no time did he deprive it of effectiveness in the commission of the offenses, attempt to prevent the crime, alert the police, or warn the intended victims.

Martin Chmiel's testimony alone is sufficient to create the inference that he was an accomplice to the aforementioned crimes.

Application of the foregoing analysis to Appellant's ineffectiveness claim leads to the conclusion that his assertion is one of arguable merit. Nevertheless, the Commonwealth contends that it was Appellant's trial strategy not to use an accomplice testimony instruction, which would have also implicated Appellant, but instead to suggest to the jury that Martin Chmiel was the sole perpetrator of these crimes. Such an assertion is not borne out by the record which indicates that Appellant's trial counsel argued that these crimes were committed by two actors, one of whom was Martin Chmiel. For this reason, there was no reasonable basis for prior counsel's failure to request an accomplice testimony instruction from the trial court. Finally, we conclude that such error was prejudicial to Appellant because, if given, the jurors might well have concluded, under proper instructions, that Martin Chmiel was an accomplice whose testimony was of little value. *See Commonwealth v. Sisak, supra.*

The judgment of sentence is reversed and the case is remanded for a new trial.

Mr. Justice Larsen did not participate in the consideration or decision of this case.

Mr. Justice Flaherty did not participate in the consideration or decision of this case.

True copy from the record
Attest: March 4, 1994

S/_____
WILLIAM G. COREY, ESQ.
Deputy Prothonotary - Eastern Dist.
Supreme Court of Penna. [J-280-1992]

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const., Amend. VI.

2. The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person... shall be compelled in any criminal case to be a witness against himself..." U.S. Const., Amend. V.

3. The Fourteenth Amendment to the Constitution of the United States states provides in relevant part that "[n]o State shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const., Amend. XIV, Section 1.